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TOWARDS WORLD LOYALTY

*Stephen Gorove**

Today we are witnessing the beginnings of a new age—an age where many of our previously established patterns of thought and behavior are breaking up and our entire social system with its traditional institutional framework is undergoing the most revolutionary transformation in human history.[1] The sweeping changes that have taken place in our lifetime are but the aftermath of the Industrial Revolution and the direct result of the ensuing rapid advances of the natural sciences.[2]

Indeed, we have come into a period of change. The discovery of the atomic energy has opened up new vistas and almost unlimited potentialities in the way of scientific progress and technological achievements;[3] it has created potentialities of an unprecedented scope which may prove a blessing to future generations or alternatively may spell the doom of our civilization.[4]

Never in the course of our history has the human race had to face a graver and more desperate a challenge. Atomic and other weapons have year by year become more and more devastating and war itself with the assistance of contemporary science has come to mean total destruction.[5]

---

*Research Associate, Yale University.

[1] *Cf.* R. B. Perry, One World in the Making 26 (1945): "While . . . changes have been increasingly progressive from the dawn of history, the rate of change has been so accelerated in recent decades as to constitute a revolution rather than an evolution." *Cf.* V. Kruse, The Community of the Future 9 (1950): "In the times in which we are at present living it seems as though everything that has hitherto formed the basis of human society is being shaken to its foundation." *Cf.* also A. N. Whitehead, Science and the Modern World 293 (1925), Haber, *Security, Freedom and Modern Technology*, 249 Annals 152, 153 (1947); M. O. Hudson, *How Can We Safeguard the World's Peace?* Address before the Houston Bar Association, Houston (January 10, 1944), p. 1.

[2] *Cf.* S. B. Clough, The Rise and Fall of Civilization 218 *et seq.* (1951); Wright, *Modern Technology and the World Order*, (W. F. Ogburn ed.) Technology and International Relations 176 (1949).

[3] See *Development and Control of Atomic Energy*, Message from the President (Oct. 3, 1945), Dep't of State Pub. No. 2702, App. 4, p. 109.

[4] The world at present is experiencing the gravest crisis in the field of human relations. See Coons, *The World Problem Today*, 23 Inst. World Aff. Proc. 19 (1947).

[5] On the destructiveness of war in the atomic age, see Brodie, *War in the Atomic Age*, (B. Brodie ed.), The Absolute Weapon 22 *et seq.* (1946); *cf.* B. Russell, Philosophy and Politics 27 (1947); Ogburn, *Introductory Ideas on Inventions and the State*, (Ogburn ed.), *op. cit. supra* note 1, at 12 *et seq.*; Austin, *Atomic Weapons and World Peace*, 71 Education 414-415 (March, 1951); Coudert, *The Future of International Law*, 21 Acad. Pol. Sci. Proc. 1 (May 1944).

Hand in hand with the recognition of the ever-increasing devastating nature of modern warfare there has been a growing realization among the pioneers of human knowledge that problems of war and peace cannot any longer be successfully tackled through the outworn methods of a previous age. The old approaches to the problem of maintaining a world at peace seem to have broken down. Humanity more than ever is in a desperate need of creative thinking. The supreme task of our time is to devise new ways and means in establishing appropriate institutions for the creation of an adequately stable world order[6] and to adjust and reshape our own behavior to the pressing exigencies of a vastly changing world. This is far from being a simple task, but the price that we shall have to pay, in case our efforts fail, will rate exceedingly high in terms of cultural value losses and human suffering. Nothing less than the survival of the Western civilization, the continuation of our most cherished democratic way of life which we have inherited lies in the balance.

I

If contemporary science is equipped at all to harbor the ambitious aim of enquiring into the complex problems of a troubled world and of endeavoring to clarify the goals at which we aim, it will have to take into consideration the basic trends and conditions obtaining in the present structure of our society.[7]

The world community of today is interconnected and the people therein highly interdependent.[8] The barriers that nature created have vanished. Modern science through man's ingenuity has provided us with fabulous means of communications which go almost beyond the bounds of our belief. Intercommunications are instantaneous. Year by year the world is growing smaller. While in the past it took weeks and months to get from one part of the world to another, today we can reach almost any part of the globe in a single day. We have a physical proximity for

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[6]*Cf.* Keeton, *The Influence of International Law on International Conduct,* 33 GROTIUS SOC'Y TRANSACTIONS 3 (1947): "The main legal—and indeed social—problem of our age is the establishment of order in international affairs, to a degree comparable with that which prevails within the frontiers of a State. Without the establishment of such an enduring international order, the prospects for human progress are slight." *Cf.* Lasswell, *The Interrelations of World Organization and Society,* 55 YALE L. J. 889 (1946); "If . . . world organization lags behind . . . humanity will remain under the shadow of atomic disaster." *Cf.* also Wright, *Human Rights and World Order,* INT'L CONCILIATION 248 (April 1943).

[7]*Cf.* LASSWELL, POWER AND PERSONALITY 204 (1948).

[8]For the territorial and functional interdependences, see McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action,* 59 YALE L. J. 60, 65 (1949); *see* also McDougal, *The Role of Law in World Politics,* 20 MISS. L. J. 253, 275 *et seq.* (1949); cf. Report of the President's Committee on Civil Rights (1947); *cf.* also H. CANTRIL, UNDERSTANDING MAN'S SOCIAL BEHAVIOR 74 (1947); BRIERLY, THE LAW OF NATIONS 91 (1949); W. LEVI, FUNDAMENTALS OF WORLD ORGANIZATION 116 (1950); Hudson, *supra* note 1, at 1; Leaves, *UNESCO and the Achievement of Peace,* 22 POL. SCI. Q. 163, 169 (April-June 1951); Wright, *supra* note 2, 176.

the first time in human history. Men and women everywhere are becoming increasingly conscious that they live in a single, world-wide interdependent community, they are more and more beginning to sense their interdependence with their fellows, they are more and more beginning to realize that they are already living physically[9] in "one world."[10]

Moreover, there is ample evidence everywhere that a new community, a new type of man is emerging with common demands, similar potentialities and expectations, with identifications that tie people everywhere together as human beings.[11] There is a groundswell of demand among the people all over the world for a wider sharing of such representative values[12] as power, wealth, respect, well-being, enlightenment, skill, rectitude and affection.[13] More and more people are beginning to identify

[9]"The world has at least become a geographic unit." See N. COUSINS, MODERN MAN IS OBOLETE 30 (1945). On the unifying force of technical development, see MORGENTHAU, POLITICS AMONG NATIONS 200 *et seq.* (1948); Rusk, *Universal, Regional and Bilateral Patterns of International Organization,* DEP'T STATE PUB., No. 3828; 24 DEP'T STATE BULL. 526 (1950).

[10]*Cf.* PERRY, *op. cit. supra* note 1 at 39. *But cf.* Remarks of the Indian Representative at the Fourth Session of the General Conference, UNESCO, *Proceedings,* p. 59.

The history of international organizations, the rapid extension of international cooperation into almost every domain of human activity clearly indicates that there has been a growing aspiration to achieve a more and more united world community. On the other hand, it is equally true that the closer and closer integration of individuals and groups into national units has become one of the chief stumbling blocks in the way of any attempt to transform these units into an effective world organization. The central problem facing mankind today is to resolve the conflict between increasing nationalism and a more and more integrated world commonwealth. See in general WRIGHT, A STUDY OF WAR (1942).

Hayes points out that while nationality always existed, "the fusion of patriotism with nationality and the predominance of national patriotism" over all other human loyalties is a modern phenomenon. See HAYES, ESSAYS ON NATIONALISN 29 (1926); *cf.* C. BRINTON, FROM MANY ONE 77 (1948): "Any effective plan for international society must . . . take into account existing national loyalties."; *cf.* also H. KOHN, THE IDEA OR NATIONALISM 22 (1944); TOYNBEE, CIVILIZATION ON TRIAL 150 (1948); 2 W. R. WHITE, LEADERSHIP 1907 (1951); Wright *supra* note 2, at 176, 182.

On the tendency of political units to grow larger, see Morgenthau, *World Politics in the Mid-Twentieth Century,* 10 REV. OF POLITICS 154, 157 (April 1948); Ogburn, *Introductory Ideas on Inventions and the State,* (OGBURN ed.), *op. cit. supra* note 2, at 7 *et seq.*

[11]Lasswell refers to *demands* as "statements that commit the speaker or writer to a preference or a determination." *Identifications,* on the other hand, may be conceived of as "statements delimiting the boundaries of the self of the statement-maker." Finally, "the non-demand statements that are not identifications" are *expectations.* See Lasswell, *The Language of Power,* in LASSWELL, LEITES & ASSOCIATES, LANGUAGE OF POLITICS 13 (1949); *cf.* LASSWELL & KAPLAN, POWER AND SOCIETY 11 (1950): "Identification is the process by which a symbol user symbolizes his ego as a member of some aggregate or group of egos. . . ."

[12]By value we mean "an object of human desire," a "desired event." See Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L. J. 203, 217 (1943); see also LASSYELL & KAPLAN, *op. cit. supra* note 11, at 16.

[13]The social process may be described in terms of values and institutions. In terms of values, the social process may be thought of as people seeking such representative values as power, wealth, respect, well-being, rectitude, enlightenment, skill and affection, and using any one or all of these values to affect the production and distribution of any one or all. See LASSWELL, *op. cit. supra* note 7, at 17; *cf.* LASSWELL, *Personality, Prejudice and Politics,* 3 WORLD POLITICS 399, 404 (April 1951); Lass-

themselves with larger and larger groups from locality to world community in their effort to share common symbols.[14]

Also, there is an increasing realization among thinking people that our existing social and political institutions[15] are highly inadequate to meet the present day challenge of humanity. Whatever we may think about the atomic age to come it seems already an obvious trusism that we now live on the threshold of an age to which we have not fully adjusted.[16] Whether we like it or not we have already outrun our institutions.[17] Sovereign States are no longer in a position to protect the life and property of their citizens from complete annihilation, and there is no trans-

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well & McDougal, *supra* note 12, at 203; McDougal, *supra* note 8, at 253; McDougal & Leighton, *supra* note 8, at 60 *et seq.*

The essence of the value-oriented analysis of human relations lies in the fact that it conceives of the social process in terms of the adaptation of institutions to the greater production of values.

For a discussion of the content analysis, in general, of which value analysis is one form, consult Lasswell, *Describing the Content of Communications*, in SMITH, LASSWELL & CASEY, PROPAGANDA, COMMUNICATION AND PUBLIC OPINION (1946); *cf.* also LASSWELL, LEITES & ASSOCIATES, *op. cit. supra* note 11.

The value patterns of human societies have changed in time and space, see GOSNELL, DEMOCRACY, THE THRESHOLD OF FREEDOM 287 (1947); the relativity of the value systems was emphasized by Margaret Mead at the International Conference on Medical Psychotherapy, see 3 INT'L CONG. ON MENTAL HEALTH 83 (London, 1948).

[14]See McDOUGAL & HABER, PROPERTY, WEALTH, LAND 1116 (1948). An international group identification under the ideal of a world citizenship is not outside the realm of possibilities. *Cf.* Krijgers-Janzen's remarks, 3 INT'L CONG. ON MENTAL HEALTH 76 (London, 1948).

Lasswell points out that since the end of the war there has been a marked change in the scope of identification of people with others. During the war people "began to think and act as members of a unified world. After the war when fragile identifications with the global community failed to bring about an effective world order, the older perspectives of nationalism reasserted themselves." See Lasswell, *"Inevitable" war: A Problem in the Control of Long-range Expectations* 2 WORLD POLITICS 1, 9 (Oct. 1949); *cf.* Bjerre's article on the theme *Collective Guilt*, INT'L CONG. OF MENTAL HEALTH 76 (London, 1948).

[15]An institution may be described as "a pattern of practices by which values are shaped and distributed." See Lasswell, *supra note* 6, at 889.

[16]*Cf.* Oppenheimer, *The Scientific Foundations for World Order*, WOODWARD & OTHERS, FOUNDATIONS FOR WORLD ORDER 42 (1949): "The advance of technology has altered the character of war and has made its elimination a pressing need, and has thus raised, far before the time when the world was politically ripe for it, the question of world order."

[17]"For many centuries"—says Reves—"the nation-centric conception of world affairs was unchallenged and unchallengeable. It served to solve current problems in a satisfactory way. . . . But the scientific and technological developments . . . have brought about in our philosophical outlook . . . a change as inevitable and imperative as the Renaissance brought about in our philosophical outlook. . . . Our Ptolemaic political conceptions in a Copernical industrial world are bankrupt. Latest observations on ever-changing conditions have made our Ptolemaic approach utterly ridiculous and out of date. We still believe, in each of the seventy or eighty sovereign states, that our 'nation' is the immovable center around which the whole world revolves." See REVES, THE ANATOMY OF PEACE 25, 27 (1945). *Cf.* also JESSUP, THE INTERNATIONAL, PROBLEM OF GOVERNING MANKIND 2 (1947); KEETON, NATIONAL SOVEREIGNTY AND INTERNATIOAL ORDER 140 *et seq.* (1939); 1 KORNER, THE LAW OF FREEDOM AS THE REMEDY FOR WAR AND POVERTY 57 (1951); MORGENTHAU *op. cit. supra* note 9, at 391; Maritain, *The Concept of Sovereignty*, 44 AM. POL. SCI. REV. 343 (June 1950); Potter, *The Challenge of World Organization*, 22 INST. WORLD AFF. PROC. 165 (1947).

cendent organization which could give us sufficient protection.[18] We have an increasing feeling of insecurity.[19] In this desperate plight, our common aspirations, our growing interdependences, mankind's age old drive for security[20] and peace,[21] seems to call for an effectively organized world community,[22] a world government, a universal state.[23]

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[18]Under present circumstances the United Nations is unable to provide the means by which any country can ensure its own security, and does not seem to be "an effective instrument for use in removing the causes of war." See Gibson, *Canadian Foreign Policy: A Forward View*, 4 INT'L J. 109, 112 (Toronto, 1949) *Cf.* LASSWELL *op. cit. supra* note 7, at 176; "The United Nations is not to be confused with an effective instrument of a united world community." *Cf.* also DEP'T OF STATE, Office of Public Affairs, *A Current Review, Economic and Social Problems in the United Nations*, No. 1, p. 1 (March 1949): "In a troubled world . . . questions are being raised more and more insistently about the efficacy of the United Nations and the whole planetary system of international organizations revolving around it."

On the inadequacy of the United Nations as a security system, see Eagleton, *Proposals for Strengthening the United Nations*, 25 FOR. POL. REP. 102, 103 *et seq.* (Sept. 15, 1949).

[19]The present age is characterized by the "world-wide insecurity which is the fate of the modern man." See Niebuhr, *The Illusion of World Government*, 27 FOR. AFFAIRS 379 (April 1949). *Cf.* Lasswell, *Propaganda and Mass Insecurity*, in STANTON & PERRY (eds.). PERSONALITY AND POLITICAL CRISIS 23 (1951): . . . the world crisis of *insecurity* . . . may last for a generation." (Italics added) *Cf.* also Coons, *supra* note 4, at 14: " . . . a profound uncertainty, a deep misgiving, haunts the world." *Cf.* also BENNETT, THE CRISIS IN HUMAN AFFAIRS 225 (1951); BONNET, THE WORLD'S DESTINY AND THE UNITED STATES 283 (1941); CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES 86 (1951); Corbett, *Effect on International Organization*, (BRODIE ed.), *op. cit. supra* note 5, at 148; WOLFERS, THE ATOMIC BOMB IN SOVIET-AMERICAN RELATIONS, *id.* at 147.

[20]*Security* may be defined as "high value expectancy, position, and potential: realistic expectancy of maintaining influence." See LASSWELL & KAPLAN, *op. cit. supra* note 11, at 61; *cf.* A. Wolfers' definition in *The Pole of Power and the Pole of Indifference*, 4 WORLD POL. 39, 51 (Oct. 1951); "the term 'security' . . . is used . . . to signify . . . high expectancy of value *preservation.*"

[21]Man in society is constantly striving for security and peace. The impulse to set up a world authority is to be attributed to "the insistent human yearning for peace." See JESSUP *op. cit. supra* note 17, at 1.

[22]As to the controversy whether the world community must precede a world state, see Wirth, *World Community, World Society and World Government: An Attempt at a Clarification of Terms*, (WRIGHT, ed.), THE WORLD COMMUNITY 10 *et seq.* (1948); *cf.* MORGANTHAN, *op cit. supra* note 9 at 406.

[23]"Either some measure of world government will be achieved by voluntary consent or our particular civilization will be destroyed." See C. MEYER, JR., PEACE OR ANARCHY 233 (1947). *Cf.* MORGENTHAU, *op. cit. supra* note 9, at 391; "What is needed" is "the transference of the sovereignty of individual states to a world authority. . . ." *Cf.* also NO YONG PARK, THE WHITE MAN'S PEACE 165, 167 (1948): "[Men] cannot survive in peace and security without an effective world organization. . . . So either through peaceful cooperation or forcible conquest, the old world, as predicted by Kant and others, will continue to move slowly and yet surely toward a destined goal, a universal state. All that men can do, or should do, is to try to bring about this unification without necessary bloodshed."

See also Quincy Wright's letter, in 1 INT'L SOC. SCI. BULL. No. 1 (1949), p. 23: "[It is essential that a] super-organization develop and such development is probably the only means in which a modicum of peace can be assured . . ."; MILTRANY, A WORKING PEACE SYSTEM 12 (4th ed. Nat. Peace Council Pamphlet No. 40); REVES, *op. cit. supra* note 17, at 121; B. RUSSELL, AUTHORITY AND THE INDIVIDUAL 67 (1949); TOYNBEE, *op. cit, supra* note 10, at 40; 1 WHITE, op. cit. *supra* note 10, at 692-4; 1 WRIGHT, *op. cit. supra* note 10, at 217; Ogburn, *supra* note 10, at 10, 11; Staley, *World Organization on the Economic Fronts*, (MORGENTHAN ed.), PEACE, SECURITY, AND THE UNITED NATIONS 112 (1946); Earle, *H. G. Wells, British Patriot in Search of a World State*, 2 WORLD POL. 181-208 (Jan. 1950); Kirk, *The United Nations and Maintaining Peace*, 22 ACAD. POL. SCI. PROC. 110, 116 (Jan.

The quest for some kind of an organization in order to unite the nations with the final aim of eliminating war[24] from human relationship is not a new phenomenon.[25] Advanced thinkers had advocated various schemes long before the great bulk of international government and non-governmental organizations was actually brought into existence.[26] The plan of the Italian poet-philosopher Dante for a "Pax Universalis,"[27] the "Great Design" of Henry IV of France,[28] Grotius' proposals for the establishment of an international congress and an arbitration tribunal,[29] William Penn's "Holy Experiment,"[30] the schemes of St. Pierre,[31] Rousseau,[32] and Bentham[33] for "Universal Peace" and Kant's great tractate on "Perpetual Peace"[34] represent but sporadic landmarks in the history of ideas aiming at order and peace in human society.[35]

The difficulties inherent in any approach to establish a super-national organization with wide legislative, judicial and executive powers are well-

1947); Rothwell, *United Nations or World Government,* 24 INST. WORLD AFF. PROC. 146 (1948).

[24]Wright defines war in the broadest sense as "a *violent contact* of *distinct* but *similar* entities." He contends that international lawyers and diplomats have usually followed Grotius' conception who defined war as "the condition of those contending by force as such." See 1 WRIGHT, *op. cit. supra* note 10, at 8, 9. For various definitions of war see Wright, *Changes in the Conception of War,* 18 AM. J. INT'L LAW 755, 762 (1926); *cf.* F. GROB, THE RELATIVITY OF WAR AND PEACE 173 *et seq.* (1949).

[25]*Cf.* Goodrich, *The Amount of World Organization Necessary and Possible,* 55 YALE L. J. 950, 953 (1946): "The Roman Empire, at its greatest extent, included all the world that mattered. . . . With the break-up of the Empire, the ideal of unity was preserved in the teachings of the Christian Church and found secular expression during the Middle Ages in the Holy Roman Empire. . . . With the rise of the modern state, the ideal of world government continued to thrive in the speculations of writers and statesmen."

[26]The idea of universal and perpetual peace which has become so wide-spread and deep-rooted in the thought of recent times was unknown to the ancient world. See B. F. TRUEBLOOD, THE DEVELOPMENT OF THE PEACE IDEA AND OTHER ESSAYS 2 (1932).

[27]DANTE, DE MONARCHIA (about 1311, *Eng. tr.* by A. Henry, 1904).

[28]See note 31 *infra.*

[29]GROTIUS, DE JURE BELLI AC PACIS *(tr.* of the 1646 ed., Carnegie End. for Int'l Peace, 1925).

[30]PENN, AN ESSAY TOWARDS THE PRESENT AND FUTURE PEACE OF EUROPE (1693 . . . Carnegia End. for Int'l Peace, 1943).

[31]ST. PIERRE (Abbé de), PROJET POUR RENDRE LA PAIX PERPETUELLE EN EUROPE (1713, *Eng. tr.):* A Project for Settling An Everlasting Peace in Europe. First proposed by Henry IV of France, and approved by Queen Elizabeth . . . 1714).

[32]ROUSSEAU, EXTRAIT DU PROJET DE PAIX PERPETUELLE DE MONSIEUR L'ABBE DE SAINT-PIERRE (1761).

[33]BENTHAN, PLAN FOR AN UNIVERSAL AND PEPETUAL PEACE (1789 . . . With an introduction by C. J. Colombos, 1939).

[34]KANT, ZUM EWIGEN FRIEDEN (1795 *Eng. tr.* by B. F. Trueblood, 1897).

On the close parallel between Kant's federalistic approach to the problems of lasting peace and the underlying ideas of the United Nations Charter, see C. J. FRIEDRICH, INEVITABLE PEACE (1948).

[35]The idea of assuring and maintaining perpetual peace and eliminating war as a means for the settlement of human affairs has not only brought to light numerous and often utopistic plans for a stable world but it has also given rise to a great many thoroughgoing inquiries into the nature and underlying causes of war which are many and complex. There is no agreement among the authorities concerning the role and significance of political, economic, social, religious, and other factors in the outbreak of the final catastrophe. *Cf.* WRIGHT, THE CAUSES OF WAR (1935); REVES, *op. cit., supra* note 17, at 121 *et seq.*

known,[36] and especially in view of the present bipolar [37] structure of the world should not be underestimated. But perhaps political impediments overshadow the significance of the creation of a feeling of necessity among the common people for a wider and more comprehensive loyalty[38] than those given hitherto to smaller communities like family, school, church or nation state.[39] If we intend to create a lasting and workable system of *"world" or "half-world"*[40] organization, be it in the near or in a somewhat more distant future, it will have to be built on corresponding supernational standards and loyalties.[41] If *"respect"*[42] for the individual human being is considered a "goal and a condition for the harmony of interpersonal relations,"[43] a wider sense of belonging to the world community, a "loyalty to mankind" is equally a goal and a condition for the wider harmony of human relations. If we regard *"respect for human dignity"* as the most enduring value in a democratic society,[44] a *"loyalty of humanity"*[45] as a whole becomes the foundation stone of a democratic world commonwealth.

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[36]Briggs, The Progressive Development of International Law 37-38 (Istanbul, 1947) *Cf.* Jessup, *op. cit. supra* note 17, at 3 *et seq.;* Oppenheimer; *supra* note 16, at 40; Corbett, *World Government in Whose Time?* 25 Int'l Aff. 426, 427 (Oct. 1949); Goodrich, *supra* note 25, at 950-965; in general see Mangone, The Idea and Practice of World Government (1951).

[37]*Cf.* McDougal, *supra* note 8, at 249. Lasswell, *supra* note 6, at 890; On the general trend toward bipolarity see also Wright, *supra* note 2, at 191; Wright, *Political Science and World Stabilization,* 44 Am. Pol. Sci. Rev. 1 (March 1950).

[38]"Loyalty" has been defined as "as sentimentalized identification or demand." See Lasswell & Kaplan, *op. cit. supra* note 11, at 24; *cf.* Cantril, *op. cit. supra* note 8, at 47: "Loyalties are ego-involved attitudes that give us a high prognosis that the purposes of others will help us carry out our purposes."

[39]Pound emphasizes the necessity for bringing about "an ideal universal background" upon which the world legal order must rest. See Pound, *Potentials for World Stability in the Field of Law,* 26 Inst. World Aff. Proc. 5, 8 (1950). *Cf.* W. Friedman, The Crises of the National State 147 (1943); "The principal weakness of federal idealism has been that it has, to some extent, put the cart before the horse. Its champions have often assumed that a constitutional and legal device which gives shape to a movement for closer interpretation based on forces making for social and political cohesions, might itself institute such integration." *Cf.* also Jessup, *op. cit. supra* note 17, at 3.

On the idea that successful federation presupposes a preliminary sense of community among the units to be federated consult Corbett, Post-War Worlds (1942); *cf.* Dexter, *Yardstick for UNESCO,* 38 For. Aff. 56 (Oct. 1949).

[40]The "half-world" or the "regional" organization of security supplements to some extent, but does not replace, the global organization of security, which is "the final gauge of peaceable intention." See Gibson, *supra* note 18, at 117.

[41]*Cf.* Morgenthau, *op. cit. supra* note 9, at 412.

[42]"Respect" is "equality of consideration as a human being." See Lasswell, *Personality, Prejudice, and Politics,* 3 World Politics 399, 401 (April 1951).

[43]See Lasswell, *op. cit. supra* note 7, at 118.

[44]A democratic society may be defined as "a commonwealth of mutual deference." See Lasswell & McDougal, *supra* note 12, at 217. *Cf.* Lasswell, *op. cit. supra* note 7, at 110; C. F. Merriam, What Is Democracy (1941); Brierly, *Notes on Psycho-Analysis and Integrative Living,* 28 Int'l J. of Psycho-Analysis 57, 99 (1947).

[45]"Loyalty to humanity" or "world loyalty" is understood to mean "a positive sentiment of being identified with a symbol referring to mankind as a whole. The definition excludes all identifications with a world garrison or prison state. . . ." See Lasswell, *World Loyalty,* (Wright ed.), *op. cit. supra* note 22 at 200.

Any attempt to establish an effective world authority without developing or spreading a feeling of universal consciousness and global solidarity will in the long run be doomed to failure.[46] The supreme challenge of our civilization is to bring about the progressive identification of individuals with larger and larger groups and finally with a free world community[47] where the various narrower loyalties of kinship, locality or nation are united in an all-embracing world loyalty.[48] As Quincy Wright puts it, "in our complicated world each human mind must continually synthesize the claims of family, nation, church, business, cultural association, local communities and world society. That is the meaning and price of liberty and peace in a diverse and shrinking world."[49] In order to attain this goal we will have to teach men how to live in harmony with others, how to make positive and friendly contacts with their fellows as citizens of a world society. The traditional expressions of both individual and collective behavior will have to undergo a radical transformation: prejudices, excessive nationalism, aggressive and destructive attitudes that may lead to hostile acts and finally to wars will have to be eradicated as predominant patterns in human relationship.[50]

II

It would seem that this is too great and ambitious a task to undertake and that the road which we would have to follow to arrive at anything that could be called a satisfactory endeavor along these lines would be wrought with insuperable difficulties. It has often been stated that we would never be able to eradicate the wrongful and aggressive tendencies and bring about a warless world since war is in the nature of men, it arises inevitably; it is a characteristic of the social evolution as the result

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[46] *Cf. Preamble* of the Constitution of UNESCO: "Peace must . . . be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind." *Cf.* also Bedwell, *Everyman's Part in International Unity,* 4 INT'L J. 147, 150 (Toronto, 1949).

[47] *Cf.* LASSWELL, *op. cit. supra* note 7, at 216: "The issue of our historical period . . . is the progressive democratization of the world community."; *cf.* also, *id.,* at 110.

[48] *Cf.* Coons, *supra* note 4, at 16: "We must strive to achieve that community . . . which is the basis for a stable and ordered society. We must work to build up the commonalty of mankind." *Cf.* also E. L. LEWIS, THE INDIVIDUAL AND SOCIETY (1949); White, *Preventing War Versus Peace Making,* 1 BULL. WORLD FED. MENTAL HEALTH 16-21 (Dec. 1949).

American experience proves that allegiance to a smaller political unit is not incompatible with a wider loyalty to a higher and more inclusive, politically organized society. See Pound, *supra* note 39, at 13; *cf.* Dean, *World Government and the Constitution of the United States,* 38 CALIF. L. REV. 452 (1950).

[49] Wright, *supra* note 37, at 11; *cf.* BRINTON, *op. cit. supra* note 10, at 77, 78: "Successful reform is usually based, not on making men have noble sentiments, but on re-directing, re-focusing, their existing sentiments, on activating some of their sentiments and on quieting others."

[50] *Cf.* DURBIN & BOWLBY, PERSONAL AGGRESSIVENESS AND WAR 134 *et seq.* (1939); Armacost, *The World Problem Today,* 23 INST. WORLD AFF. PROC. 10, 14 (1947).

of which a higher type of society will emerge.[51] It is true that the age of war seems to have always been with us. Ever since the dawn of history men have been fighting wars.[52] The mere fact, however, that most of the former civilizations have perished as the result of internal strifes, revolutions and other conflicts,[53] provides no convincing evidence for the assumption that war is inherent in the human nature.

For a more adequate and reliable answer to this problem we will have to turn to the specialists on social phenomena to see if they can state for us in general terms what is known about human behavior, whether there is sufficient warrant to believe that individual and group conflicts periodically culminating in wars of unprecedented destructiveness and threatening the basic existence of human society have their roots "in a constitutional peculiarity of the species which, in the last instance, is the result of the biological make-up of men."[54]

The orientation toward the social sciences may also be helpful in another direction. A deeper penetration and a more intensive inquiry into the secret springs of human action may help us to a better understanding of the psycho-social factors and mental attitudes predisposing towards international understanding or towards aggressive nationalism. The social sciences should be able to contribute additional insights into the conditions which must obtain if national aggressions are to be decreased and individual and group behavior difficulties to be avoided. Moreover, the human sciences may be of some help in the discovery of new techniques by which serious international tensions could be alleviated and the chances of hostility could be reduced.[55] In this way obstacles preventing the growth of wider allegiances could be removed and at the same time much of hitherto wasted human energies and potentialities could be channelled toward constructive purposes.

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[51] *Cf.* N. Angell, Human Nature and the Peace Problem 19 (1925): "It has always been a favorite plea of those who regard war with a certain complacency that it arises inevitably." *Cf.* also Barnes & Ruedi, The American Way of Life 439 (1950).

[52] Wright says in his "A Study of War" (pp. 37 *et seq.)* that "War in the psychological sense began with organic nature . . . War in the sociological sense could not exist as a distinct situation equally permitting groups to expand wealth and power by violence began with civilization . . . War in the modern technical sense began with the period of world civilization." *Cf.* Curtis, World War, Its Cause and Cure 17 (1945); Schwarzenberger, *Peace and War in International Society,* 1 Int'l Soc. Sci. Bull. No. 3-4 (1949), pp. 61, 66.

[53] *Cf.* Toynbee, A Study of History (1935).

[54] See Bjerre, *supra* note 14, at 76.

[55] The Committee on Techniques for Reducing Group Hostility of the Social Science Research Council emphasizes the need for devising "practical techniques for the nonviolent integrative solution of conflicts in the world community. . . ." See Forword to R. W. Williams, Jr., The Reduction of Inter-Group Tensions (Soc. Sci. Res. Council, Bull. 51, 1947), Sf. Horkheimer, *The Lessons of Fascism,* (Cantril ed.), Tensions That Cause Wars 211 (1950).

A careful analysis of the social process and the patterns of human behavior reveals that the contention that war is inevitable because of the existence of an aggressive instinct is based on faulty observation and fallacious thinking.[56] There is no biological basis for aggressive instincts.[57] However great Frued's contributions may be "[his] explanation of war is definitely inadequate."[58]

Biology teaches us that living creatures including men are the products of inherited dispositions and environmental experiences.[59] The way of life of the individuals, the virtues and the aggressiveness they exhibit are learned in their experience in the social environment.[60] Prejudices,[61] too, which are parts of the mental equipment of each individual are picked up as our personality[62] develops.[63] Attitudes,[64] traditions and value patterns which are often deeply embedded in our personality may be responsible for the lack of harmony in human relationship.[65] Projections and displacement of aggression,[66] antagonism,[67] intense and undue nation-

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[56]See F. OSBORN, OUR PLUNDERED PLANET 23 (1948); Schwarzenberger, *supra* note 52, at 66.

[57]See Forel, *Switzerland*, (G. W. KISKER ed.), WORLD TENSION, THE PSYCHOPATHOLOGY OF INTERNATIONAL RELATIONS 261 (1951); *cf.* 4 SUMMER & KELLER, THE SCIENCE OF SOCIETY 369 (1927): "There is no 'instinct of pugnacity'"; *cf.* also FENICHEL, THE PSYCHOANALYTIC THEORY OF NEUROSIS 59 (1945): "It seems . . . as if aggressiveness were originally no instinctual aim of its own . . . but rather a more in which instinctual aims sometimes are striven for in response to frustrations or even spontaneously."

[58]See O. KLINEBERG, SOCIAL PSYCHOLOGY 88 (1940).

[59]See C. KLUCKHOHN & H. A. MURRAY (eds.), PERSONALITY IN NATURE SOCIETY, AND CULTURAL 48 (1948); *cf*, WRIGHT, THE CAUSES OF WAR AND THE CONDITIONS OF PEACE 107 (1935): ". . . the world appears as a population of human individuals each behaving according to his heredity and environment." *Cf.* also Anderson, *Genetics and Medical Practice*, 71 JOURNAL-LANCET 49 (Feb. 1951); Dobzhansky, *Heredity, Environment and Evolution*, 111 SCIENCE 161 (1950).

[60]See Benedict, *The Study of Cultural Continuities, in* UNESCO, TOWARDS WORLD UNDERSTANDING, No. 6, p. 7.

[61]Lasswell draws the attention to the dynamic factors contributing to prejudice and their highly significant role in world affairs. See Lasswell, *supra* note 42, at 400; *cf.* BETTELHEIM & JANOWITZ, DYNAMICS OF PREJUDICE (1950).

[62]The term "personality" refers "to the way a person acts toward other persons." See Lasswell, PERSON, PERSONALITY, GROUP CULTURE, *in* P. MULLAHY (ed.), A STUDY OF INTER-PERSONAL RELATIONS 319 (1949).

[63]See BARNES & RUEDI, *op. cit. supra* note 51, at 528; *cf.* H. V. EVATT, THE TASK OF NATIONS 238 (1949). Barnes and Ruedi mention cultural isolation, racial and class differences, social customs, political and economic conditions, religious practices among the main sources of prejudice (at 529 *et seq.*).

[64]Klineberg defines "attitude" as "a state of readiness for certain types of response." See KLINEBERG, *op. cit. supra* note 58, at 370.

[65]*Cf.* MARGARET MEAD, MALE AND FEMALE (1949).

[66]Practically all references in psychological literature refer to "aggression" as being equivalent with hostility, attack and destruction. See Allen's remarks on *Personality Development in Its Individual and Social Aspects with Special Reference to Aggression*, 2 INT'L CONG. MENTAL HEALTH 5 (1948); Lasswell speaks of destructive impulses as "the initial phases of acts which if brought to expression destroy congenial and creative interpersonal relations." At the same time he asserts that a "social equilibrium free of destructiveness would be rid of many of the traditional scourges of mankind." (*Op. cit. supra* note 7, at 111.)

Authorities point out also that it is necessary to recognize the healthy non-

alism and manifestations of tensions[68] may equally contribute to much of the strain, suspiciousness and intolerance in international relations[69] and may be precursors of hostile acts and may lead to war. Cultural patterns[70] which men pass down from one generation to another[71] may induce "personal anxieties and conflicts in their carriers."[72] Certain types of stresses may be conducive to aggression. Starvation, for instance, is usually considered "as a cause for revolution, upheavals and invading other people's land."[73] The casual relationship, however, between stress and aggression is not always recognized. "The effects of exposure to idle-

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ruthless forms of aggression as well as the more dangerous kinds. See ASHLEY-MONTAGU, STATEMENT ON RACE 132 (1951). The conditions making for healthy and undue aggression in modern society and the place of aggression in the biological scheme as a whole were the main themes of a symposium held by the medical section of the British Psychological Society on June 22, 1949. See 164 NATURE 428 (Sept. 10, 1949).

[67]Psychiatrists tell us that "antagonisms" are due to the "activity of the self-preservative tendencies and their accompany emotion of fear and greed." See Statement made by the American Psychiatric Association quoted in 33 MENTAL HYGIENE 323 (April 1949).

[68]"Tension" may be conceived of as "the piling up of energy within a personality which, for the moment, has no satisfactory channel of discharge." See Wheelis, *The Place of Action in Personality Change,* 13 PSYCHIATRY 135, 137 (1950).

Tensions are likely to occur when development of one part of one system or one process gets too far ahead or too far behind the others. See Wright, *supra* note 37, at 10.

Wirth, in analyzing the nature and role of social tensions, rightly contends that "tensions do not inevitably lead to overt conflict, but are a pre-condition to it. All life involves some tension. Tensions may have an organizing and integrating effect upon groups and societies. The chief problem for social scientists is to discover the extent to which unjustified and undesirable inter-group tensions and, above all, to prevent or control those that do arise in such a manner, that they can be resolved without violence or without undermining democratic ideals and practices." See Wirth, *Comments on the Resolution of the Economic and Social Council,* I INT'L SOC. SCI. BULL. No. 3-4 (1949), pp. 137, 142, *cf.* Wright, *The Nature of Conflict,* 4 WESTERN POL. QUART. 196 *et seq.* (June 1951).

[69]See Anna Freud's remarks in 2 INT'L CONG. MENTAL HEALTH 22 (1948).

[70]"Culture" refers "to the way that members of a group act in relation to one another and to other groups." See Lasswell, *supra* note 62, at 319.

[71]In recent times evidence has accumulated from various fields but especially from the ranks of cultural anthropologists which seem to indicate that cultural patterns as determining factors of human behavior are more firmly fixed than had been commonly supposed. See Dunn, *The Present Course of International Relations Research,* 2 WORLD POL. 80, 88 (Oct. 1949); *cf.* Allen's remarks, *supra* note 66 at, 22; Benedict, *supra* note 60, at 7; UNESCO, *Programme* Proposed by the Executive Board 15 (1950).

[72]See Honigman, *Culture Patterns and Human Stress,* 13 PSYCHIATRY 25, 34 (1950); see also Spire, *Culture and Personality,* 14 PSYCHIATRY 19-26 (1950). In general see R. LINTON (ed.), THE SCIENCE OF MAN IN THE WORLD CRISES (1947).

An attempt has been made by Honigman to demonstrate the utility of the culture concept as a tool for understanding tensions or stresses in human beings. He illustrates how cultural patterns may be utilized as mechanisms for relieving stress and points to the limitations which surround this approach. (Pp. 25-34.)

The relation to war and peace of cultural factors, personality attitudes, aggressiveness, international cooperation, world integration is discussed in T. H. PEAR (ed.), PSYCHOLOGICAL FACTOR OF WAR AND PEACE (1950); *cf.* KLINEBERG, *op. cit. supra* note 58, at 86; UNESCO (compiled by), FREEMAN AND CULURAL (1951); Margaret Mead, *Social Change and Cultural Surrogates,* 14 J. EDUCATIONAL SOCIOLOGY 92-110 (1940).

[73]See A. H. LEIGHTON, HUMAN RELATIONS IN A CHANGING WORLD 108 (1949).

ness, to lack of satisfying work, to low esteem and ridicule, to frustration, to uncertainty, and other items that have to do with the way people feel, are usually ignored by those who are not themselves undergoing these stresses at the time."[74]

The foregoing sample of statements by the social scientists provides a valuable insight into the types and patterns of human behavior which if prevalent in the society would most likely thwart our chances of success in developing progressive identifications of individuals and nations with the world community. The more specific problem confronting mankind today lies therefore in the feasibility of preventing, modifying, or arresting the spread of negative mass mental attitudes which are harmful to international understanding and of encouraging positive identifications along many different lines towards the creation of a world society. Our present knowledge about human behavior leaves no doubt that the psyhological and emotional status of man is plastic and capable of change by human contact, especially in childhood.[75] Current findings of cultural anthropologists tend to emphasize the immense modifiability of human nature and social institutions.[76] If this is true then the ultimate solution to the pressing problems of our times lies within the powers of man. In the words of Reves: "In this confusion and chaos in which the civilized nations are struggling we are bound to arrive at the inevitable conclusion that the cause of this hopelessness and helplessness lies not in the outer world but in ourselves."[77]

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[74]See LEIGHTON, *op. cit. supra* note 73, at 108. Leighton enumerates the following general types of stress by which people may be disturbed.

(a) Threats to life and health;
(b) Discomfort from pain, heat, cold, dampness, fatigue, and poor food;
(c) Loss of means of subsistence, whether in the form of money, jobs, business, or property;
(d) Deprivation of sexual satisfaction;
(e) Enforced idleness;
(f) Restriction of movement;
(g) Isolation;
(h) Threats to children, other family members and friends;
(i) Dislike, rejection and ridicule from other people;
(j) Capricious and unpredictable behavior on the part of those in authority upon whom one's welfare depends. *Id.* at 76, 77.

[75]THE 1949 YEARBOOK OF PSYCHIATRY AND NEURO-SURGERY 342 (1950).

[76]*Cf.* ASHLEY-MONTAGU, *op. cit. supra* note 66, at 14; "Plasticity, educability is a characteristic trait of Homo Sapiens which all human beings possess." *Cf.* Beaglehole, *Interpersonal Theory and Social Psychology*, (MULLAHY ed.), *op. cit, supra* note 62, at 78; *cf.* further *Mental Health and World Citizenship,* Report of a Meeting Held at the University of Rochester, New York, under the auspices of the Mental Hygiene Society, Monroe County, I BULL. WORLD FED. MENTAL HEALTH 35 (Dec. 1949).

[77]REVES, *op. cit. supra* note 17, at 29; *cf.* TOYNBEE, op. cit. *supra* note 10, at 41; *cf.* also Linton, *Present World Conditions in Cultural Perspective,* (LINTON ed.), *op. cit. supra* note 72, at 201.

III

The contemporary man is becoming increasingly conscious of the tremendous values at stake and has realized to a certain extent the responsibilities that science and technology have placed in his hand. The establishment of the United Nations and its specialized agencies marked a new era in the history of international organizations. For the general purpose of promoting international peace and security a vast machinery has been devised and put into operation to deal practically with every conceivable matter which yielded to international action. A brief survey of the activities of international organizations having a closer bearing on the framework of our discussion will indicate the eventual approaches that have been applied to the problems at hand and will be of help in evaluating possible alternatives for future courses of action.

Among the specialized agencies of the United Nations, UNESCO has paid considerable attention to the problems of human behavior, more particularly of mental attitudes and their repercussion on the political and social life. It is the Constitution of UNESCO that says "that since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed."[78] UNESCO has realized from its inception that this constitutional objective can be furthered only if an attempt is also made to understand better the contemporary man and the modern world, his environment: "That which he has created out of his own personality and its interplay with other personalities in the social environment; that which he faces in his physical surroundings, in nature and in his community."[79]

The interdependences of our age and the extreme complexity of the patterns of human motivation have made it imperatively necessary for UNESCO to seek and ensure, in constructing the peace in the minds of men, the effective and continuing assistance and collaboration of specialists in such branches as sociology, political economy, comparative law and

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[78]See *Preamble* of the Constitution of UNESCO. In this connection it has frequently been pointed out that even if one is inclined to accept the validity of the statement that wars begin in the minds of men, it remains open to inquiry whose minds and what men are we referring to? Klineberg contends that the fact that most men clearly do not want war has sometimes led to the conclusion that the study of the minds of "most men" is irrelevant in this respect. He points out, however, that although most men do not want war, they do want a "way of life"—which they may believe they can obtain only through war. Believing this, they may consider war evil and still regard it as inevitable. For this reason, Klineberg believes that leaders and followers are equally important and their minds must be considered as well. See Klineberg, *The UNESCO Project on International Tensions*, 1 INT'L SOC. SCI. BULL., No. 1 (1949), pp. 11, 12. For an illuminating and thoroughgoing analysis of this topic in general see DUNN, WAR AND THE MINDS OF MEN (1950); A critical account of UNESCO activities in this field is given by Besterman in his "UNESCO: Peace in the Minds of Men" (1951).

[79]UNESCO, *Programme* of UNESCO in 1948, c. iv.

social psychology. Under its auspices a whole series of activities were initiated ranging from the collection of data available from the work of human scientists to the wide dissemination of their latest methods and techniques as these relate to the promotion of positive identification of individuals and communities. It is clear from the efforts of UNESCO that the actual implementation of its constitutional objective centered around the over-all effort to speed up the process of social evolution towards integration into a world society.

One important aspect of world integration was the elimination of tensions.[80] By studying and investigating scientifically the nature, origin and development of social tensions[81] affecting international understanding and bringing the results of studies to world attention UNESCO has hoped to make a positive contribution to the cause of world peace.[82]

The Tensions Project[83] which was initiated by the General Conference of UNESCO in 1947 and modified slightly in the subsequent years has completed the first stage of its operation, namely the launching and

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[80]The term "tension" is well known to psychologists in the field of motivation, where it is frequently used as "the equivalent of any unstable, psycho-physical state leading to action." See Klineberg *supra* note 78, at 12; *cf.* also BRIT. MED. J. 621 (Sept. 9, 1950).

[81]Angell defines "social tension" as "a strained relationship between two persons or groups which generates attitudes of hostility that may either be expressed toward the opposite pole, or displaced on some convenient scapegoat." He points out, however, that "the discharge of hostility on other objects gives only temporary relief and does not fundamentally alter the state of tension." See Angell, UNESCO *and Social Science Research* 15 AM. SOCIOLOGICAL REV. 282, 283 (April 1950).

The present day political and social life is characterized by a state of more or less continuous tension. *Cf.* ALMOND, THE AMERICAN PEOPLE AND FOREIGN POLICY 18 (1950). The psychological implications of world tension are explored in KISKER (ed.), *op. cit. supra* note 57.

As to the measurement and causes of social tensions consult Wright, *Measurement of Variations in International Tensions,* (BRYSON, FINKELSTEIN & MACIVER (eds.), LEARNING AND WORLD PEACE 54, (1948); *cf.* I WRIGHT, *op. cit. supra* note 10, at 1103 *et seq.;* Forel, *supra* note 57, at 265.

[82]Skeptical views as to the value of the Tensions Project were voiced at the outset by the French delegate, see UNESCO, *Records* of the General Conference, 3rd Session Proceedings, Vol. 1 (1948), p. 342; *cf.* also remarks made by the representative of New Zealand, *id.* at 343.

On the nature and basis of the present East-West conflict with reference to the UNESCO Tensions Project, see remarks made by the Indian representative, UNESCO, *Records* of the General Conference, 4th Session Proceedings (1949), pp. 59, 60; *cf.* DUNN, *op. cit. supra* note 78, at 105 *et seq.;* Klineberg, *supra* note 78, at 20.

[83]It may be pertinent to note in connection with the Tensions Project that the point "in whom and where" do tensions occur has never been fully clarified. The suggestion was made that at least three major varieties or levels of tension could be distinguished: those within the individual, those within the group or nation, and those between nations. See Klineberg, *supra* note 78, at 12. *Cf.* UNESCO, *Records* of the General Conference, 3rd Session Proceedings, Vol. 1 (1948), p. 343.

For an excellent inquiry into the nature and role of social tensions and the UNESCO Tensions Project in general see KLINEBERG, TENSIONS AFFECTING INTERNATIONAL UNDERSTANDING: A SURVEY OF RESEARCH (1950); Truman, *Political Behavior and International Tensions,* 3 WORLD POLITICS 545-554 (July 1951); *cf.* Wright, *The Importance of the Study of International Tensions,* 2 INT'L SOC. SCI. BULL. 90 (Spring 1950).

partial implementation of one or more pieces of work under each of the activities entrusted to it.[84]

The major undertakings of UNESCO in the Tensions Project were directed first of all toward studies that had to deal with the divergent orientation of people and the distinctive character of various national cultures, ideals and legal systems that may give rise to international tensions.[85] *"Way of life"*[86] studies and *"community studies"*[87] were initiated and inquiries were made into national images and *"stereotypes"*[88] that may accentuate international tensions. It was hoped that an inquiry into the *"way of life"* of the principal nations of the world through a series of monographs would stimulate the sympathy and respect of nations for each others' ideals, aspirations and the appreciation of national problems.[89]

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[84]UNESCO, Budget Estimates for the Financial Year 1950, p. 112; *cf.* also UNESCO, Budget Estimates for the Financial Year 1951, p. 151.

[85]UNESCO, *Report* to the United Nations 1948-1949, p. 41; *cf.* also *id.* 1949-1950, at 70.

[86]With the collaboration of the International Studies Conference monographs have been written or are being prepared on the "way of life" of different nations including Australia, Canada, Egypt, France, Greece, Hungary, India, Italy, Lebanon, Mexico, New Zealand, Norway, Pakistan, Poland, South Africa, Switzerland and the United Kingdom. UNESCO, *Report* to the United Nations 1949-1950, p. 70.

In connection with the studies undertaken by UNESCO on the "way of life," Klineberg recommends the use of interview techniques directed to a representative sample of the populations in various countries. We suggest that of the conclusions of Ruth Benedict regarding the Japanese, or of Geoffrey Gorer regarding the Americans should be tested on a representative sample of the nations concerned. He also proposed systematic studies of problems relating to the cultural "offerings" (plays, books, etc.) of one country to another and the reasons why some are accepted and others rejected. See Klineberg, *supra* note 78, at 14; *cf.* Klineberg, *Psychological Aspects of International Relations,* in Ax Stanton & Perry (eds.), *op. cit. supra* note 19, at 233.

[87]The investigations in this field were to be conducted both in an industrialized and in a rural community within the country concerned. *Cf.* Klineberg, *supra* note 78, at 13; Klineberg, *UNESCO Community Studies,* 1 Bull. World Fed. Mental Health 9, 10 (April 1949).

[88]The major activity in this area consists of an extensive study of the ideas which the people of one nation hold concerning their own and other nations. Dr. Henry Durant of the British Institute of Public Opinion was assembling in a single report the "public opinion surveys" carried out in eight countries. Parallel work on ready-made conceptions or "stereotypes," their nature and origin particularly among children, was initiated in several countries. *Cf.* UNESCO *Report* to the United Nations 1948-1949, p. 42; *cf.* also *id.* 1949-1950, at 71.

On the problem whether stereotypes necessarily contain an element of truth, see Klineberg, *supra* note 86, at 235.

For a collection of recent articles concerning new methods in stereotype research, see 3 Int'l Soc. Sci. Bull. 505-591 (Autumn 1951). An extensive bibliography will be found in Klineberg, *The Scientific Study of National Stereotypes, id.* at 513.

[89]Klineberg has drawn the attention to the fact that the assumption that knowledge about other nations increases friendship is not always true. Similarly international contacts through the travel of tourists, students, professors, merchants, diplomats, etc., may have various effects on the travellers and on the people among whom they travel. Yet, people have to be taught the national differences, so that when they encounter differences they will know how to interpret them. See Klineberg, *supra* note 78, at 16, 17; *cf. Wirth, supra* note 22, at 17: ". . . frequency and intimacy of contacts can become the basis of conflict as well as of harmony."; on the need for accurate descriptions of predominant opinions, attitudes and beliefs, see Leighton, *op. cit. supra* note 73, at 101.

Similarly, it was felt that comparative studies of the various national legal system would help to eliminate the effects of differences in legal terminology, theory and interpretation.[90]

Another essential feature of the same project related to tensions arising from technology[91] with particular emphasis on the relationship between technology and education, technology and community[92] and technology and underdeveloped areas.[93] In this field studies were encouraged on the possible methods of relieving tensions caused by the introduction of modern techniques in non-industrialized countries and those in process of industrialization, and on the sense of belonging arising from technological changes.[94] In realizing that technical development which contributes so much to material progress may be the cause of serious maladjustments[95] unless it is accompanied by a complementary intellectual and moral development the Social Science Division of UNESCO[96] called an

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[90]The preparation of a first volume on the tensions arising from differences between legal systems based on Common law and those based on Roman law has been entrusted to the *Centre de Droit Comparé* in France. With a view to encouraging further studies in the field of comparative law, UNESCO has arranged for the creation of an *International Association of Comparative Law,* comparable to the international organization of sociologists, economists and political scientists. *Cf.* UNESCO, *Report* to the United Nations 1949-1950, p. 70; UNESCO, *Records* of the General Conference, Resolutions, 5th Session (1950), p. 39; 1 INT'L SOC. SCI. BULL. No. 3-4 (1949), pp. 65, 66, 91; *cf.* also Hazard, *A World Organization for Comparative Law,* 2 J. LEGAL EDUCATION 80-86 (Autumn 1949); Sturges, *The Quest for World Law and Order,* 22 TULANE L. REV. 558-568 (June 1948).

It may be well to recall, by way of comparison, that an independent, scientific organization, the International Congress of Comparative Law, at its third session in 1950, had considered the problem of unifying legal teaching methods and creating an International Faculty of Law and an International Center for the organization of legal documentation. The Congress expressed the opinion that no durable results could be achieved in the field of unification of private law without developing and spreading the spirit of international legalmindedness. See REVUE HELLENIQUE DE DROIT INTERNATIONAL 283 (April-Dec. 1950).

[91]"Technology" has been defined as "the application of inanimate energy to human work." See *The UNESCO Tensions Project and Modern Technology,* 1 INT'L SOC. SCI. BULL. No. 3-4 (1949), p. 170.

[92]Technology has revolutionized the occupational structure of every society. It has given us the modern factory, mass production and the worker on the belt conveyor. This, in turn, has brought about "a great increase in material goods, and a corresponding increase in human tension, national and international." *Id.* at 171.

[93]UNESCO has two important functions in the field of tensions arising in technologically undeveloped countries:

(a) "To develop local education, to aid the people in adjusting to changing ways of life. Illiterate populations cannot cope with modern technology, where age-old agricultural habits give way to mechanized farming and the factory.

(b) "To maintain the culture of the local populations so far as is consistent with necessary technological changes and higher living standards; in particular to promote and preserve native arts, handicrafts, and recreations." *Id.* 172.

[94]UNESCO, Budget Estimates for the Financial Year 1951, p. 149; see further UNESCO, *Records* of the General Conference, Resolutions, 5th Session, p. 40.

[95]*Cf.* Klineberg, *supra* note 78, at 18: "Modern industrial and technological developments have taken from human beings almost all the satisfaction which formerly went with the accomplishment of a task. . . ."

[96]UNESCO's Department of Social Sciences is fostering three of the principal social sciences: sociology, political science and social psychology. A useful summary

ad hoc conference to consider the feasibility and scope of UNESCO's attention to the impact of technology on interpersonal, intergroup and international tensions as one of the major considerations in the Tensions Project.[97] UNESCO in cooperation with ILO also conducted an inquiry into the influence of modern technology upon the attitudes and mental relationship of peoples. Special stress was laid upon the technology factors affecting great masses of people.[98]

UNESCO also undertook studies of population problems affecting international understandings,[99] more particularly of tensions resulting from over-population, shifts of population and from obstacles to free movement of peoples;[100] it promoted investigation of certain problems with respect to the cultural assimilation of immigrants[101] with a view to improving intergroup tensions[102] UNESCO initiated studies of tensions arising from

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on the organization and scope of activity of the Department of Social Sciences will be found in 1 INT'L SOC. SCI. BULL. No. 3-4 (1949). p. 127.

[97]Particular emphasis was placed by the Conference on the world-shrinkage due to industrialism, the socio-educational problems arising from rapid industrialization in western culture and in those cultures that hitherto have been but little effected by western intellectualism and scientific technology. See Line, *A note on the Conference on Technology and Human Relations,* 1 BULL. WORLD FED. MENTAL HEALTH 11 (June 1949).

[98]UNESCO, *Report* to the United Nations 1948-1949, p. 42.

[99]In a closely related field the Population Commission of the Economics and Social Council is primarily concerned with the relationship of economic and social factors and population trends. More specifically the Commission is entrusted to arrange for studies and to advise the Council on

(a) Population changes, the factors associated with such changes, and the policies designed to influence these factors;
(b) Interrelationship of economic and social conditions and population trends;
(c) Migratory movements of population and factors associated with such movements;
(d) Any other population problems on which the principal or subsidiary organs of the United Nations or the specialized agencies may seek advice. See Res. of Oct. 3, 1946, No. 3 (III), Docs. E/190/Rev. 2, E/223, E/229; *cf. The United Nations 4 Years of Achievement,* DEP'T STATE PUB. No. 3624, Int. Org. and Conf. Ser. III, 36, p. 23.

[100]UNESCO, *Records, supra* note 94, at 40; on population problems and international tensions see 1 INT'L SOC. SCI. BULL., No. 1 (1949), pp. 54-63; *cf.* LINTON (ed.), *op. cit. supra* note 72, at 258-281; on the economic and social effects of international migratory movements in general see CITROEN, LES MIGRATIONS INTERNATIONALES (Paris, 1947); on psychological difficulties of adjustment to new environment arising out of displacement and migration see Tyhurst, *Displacement and Migration,* 107 AM. J. PSYCHIATRY 561-568 (Feb. 1951).

It should be noted that the Carnegie Endowment for International Peace organized a Seminar in Paris in February 1949, on the relation between population problems and international tensions. See UNESCO, *supra* note 86, at 71.

the cultural assimilation of immigrants.[101] With a view to improving

[101]Reports on the cultural assimilation of immigrants were made under the auspices of the International Union for the Scientific Investigation of Population Problems. *Ibid.*

[102]Among the various methods that are available and have been used to improve inter-group relations, Wirth enumerates informational and educational devices, the facilitation of inter-group contacts, the provisions of means for the investigation and adjustment of tension situations or overt conflict situations, combatting movements or organized efforts designed to promote the spreading of prejudices and to arouse intergroup conflicts. See Wirth, *supra* note 68, at 143-5.

racial contacts[103] and facilitated the teaching and dissemination of scientific facts about racial and cultural groups and ethnic minorities;[104] in Brazil it organized a pilot investigation of contacts between races or ethnic groups with the aim of determining the economic, political, cultural and psychological factors, whether favorable or unfavorable, to harmonious relations between races and ethnic groups.[105]

In reply to an express request from the Economic and Social Council[106] UNESCO submitted to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities a detailed work plan suggesting what contribution UNESCO might make in the fields within its competence.[107] Other segments of related inquiries deal with the

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[103]In July 1950 UNESCO issued a Statement submitted by distinguished experts on race problems. The Statement emphasizes that scientists have reached general agreement in recognizing that mankind is one: that all men belong to the same species, *Homo Sapiens*. In the Statement "race" is defined as "one of the group of populations constituting the species *Homo Sapiens* . . . [It] designates a group or populations characterized by some concentrations, relative as to the frequency and distribution, of hereditary particles (genes) or physical characters, which appear, fluctuate and often disappear in the course of time by reason of geographic and/or cultural isolation." See ASHLEY-MONTAGU, *op. cit. supra* note 66, at 22, 48, 54.

On tensions arising from racial contacts see Ramos, *The Question of Race and the Democratic World*, 1 INT'L SOC. SCI. BULL., No. 3-4, pp. 9-14 (1949); *cf.* 2 INT'L SOC. SCI. BULL., No. 2, pp. 455-513 (1950).

On racial concepts and differences in general consult ASHLEY-MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE (1942); KLINEBERG, RACE DIFFERENCES (1935); KLINEBERG, RACE AND PSYCHOLOGY (1951); LINTON (ed.), *op. cit. supra* note 72, at 37-77.

[104]UNESCO, *Records, supra* note 94, at 40.

Wirth defines "minority" as "a group of people who, because of their physical or cultural characteristics are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination." He stresses the fact that the minorities question in all parts of the world is coming to be increasingly indivisible as internal strifes in a country become a threat to the peace of all. See Wirth, *The Problem of Minority Groups, in* LINTON (ed.), *op. cit. supra at* note 72, at 346, 347; *cf.* R. M. WILLIAMS, THE REDUCTION OF INTER-GROUP TENSIONS: A SURVEY OF RESEARCH ON PROBLEMS OF ETHNIC, RACIAL, AND RELIGIOUS GROUP RELATIONS (1947).

[105]UNESCO, *Records, supra* note 94, at 40; UNESCO, Budget Estimates, *supra* note 94, at 149.

[106]The request called for

(a) action on the part of UNESCO to make available to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities any relevant material or analyses that might result from UNESCO's study of social tensions or from any other UNESCO program;
(b) collaboration between the United Nations and UNESCO in the formulation of such program;
(c) consideration on the part of UNESCO of the desirability of initiating and recommending the general adoption of a program of disseminating scientific facts designed to remove what is commonly known as racial prejudice;
(d) consideration on the part of UNESCO of the creation of a committee of world leaders in educational theory and practices, which should make it its business to study and select the most common and basic principles of a democratic and universal education in order to combat any spirit of intolerance or hostility as between nations and groups. See Economic and Social Council, Res. 116 (VI) B.

For Wirth's comments on this Resolution see *supra* note 68, at 137-145.

[107]UNESCO, *Report* of the Director-General on the Activities of the Organization in 1949, p. 49.

In commenting on the Resolution of the Economic and Social Council on the

dual process of internal tensions and their displacement outward in form of external hostility. Studies in this area include an investigation of the origins and philosophic bases of Fascism and National Socialism,[108] the attitudes of German youth toward authority and their orientation, the making of field inquiries into certain tensions and attitudes among Japanese youth.[109]

Another group of studies covers the broad problems of attitude formation and changes, modern methods developed in education, political science, philosophy and psychology for changing mental attitudes[110] and the social and political circumstances that favor the employment of particular techinques.[111] An essential feature of this project is a combined effort by experts in the fields of sociology, psychology, psychiatry, economics and philosophy to explore the condtions which must be created if attitudes leading to international aggression are to be replaced by those leading to cooperation among the peoples.[112]

Prevention of Discrimination and the Protection of Minorities, Wirth contends that the subject of minorities and related problems of prejudice and discrimination requires for its adequate understanding "a thoroughgoing account of the value-systems of the society in question, of the historical background under which it developed, of the institutional framework within which it operates and of the attitudes which are held by the people involved." *Supra* note 68, at 137.

[108]The Coordinating Committee for the Study of the Origins of Fascism, set up in Monaco in November 1949, under the auspices of the International Council for Philosophy and Humanistic Studies, drew up a detailed plan of work which includes:

(1) A study of the philosophic bases of Fascism and National Socialism;
(2) An enquiry into the conditions which facilitated and were responsible for the transition from theory and ideological doctrine to practice and policy;
(3) An enquiry into the techniques and devices used for teaching this doctrine to the peoples of Germany and Italy in the period preceding the second world war. See UNESCO, *Report, supra* note 107, at 45; UNESCO, Records of the General Conference, Resolutions, 4th Session (1949), p. 22.

[109]UNESCO, *Records, supra* note 94, at 40.

[110]*Cf.* UNESCO, *UNESCO and its Programme,* No. 2, The Basic Programme, adopted by the 5th Session of the General Conference (1950), p. 20.

As part of the study of "modern methods . . . for changing mental attitudes," The New Education Fellowship, an international educational organization with headquarters in London, was making a socio-psychological investigation into prejudice among teachers, and the manner in which teachers may correct their attitudes in this respect. Similarly, the Society for the Psychological Study of Social Issues (U. S.A.) was preparing a study on the measurement of prejudice. See UNESCO, *Report, supra* note 86, at 70, 71; *cf.* Klineberg, *supra* note 78, at 16, 17.

[111]UNESCO, *Report* to the United Nations 1948-1949, p. 42; *id.* 1949-1950, at 71.

[112]In a Symposium entitled "Tensions that Cause Wars" eight eminent social scientists of different nationality elaborate on the main influences which make for international understanding or promote the development of aggressive nationalism. The book contains a joint statement and separate articles by the authors on the nature and causes of tensions that may lead to war. The Statement emphasizes the growing demands of the people everywhere to be free from hunger and disease, from insecurity and fear; it stresses that need for fundamental changes in our social organization to bring about maximum social justice; it recognizes the dangers of excessive nationalism and calls for a self-disciplined assessment of the various forms of social life; finally, it draws the attention to the role of modern means of communications and points to the possible contribution of the social sciences to the problems of peace. See CANTRIL, *op. cit. supra* note 55 at 17-21.

UNESCO has also arranged for the preparation of a history textbook to serve as a model,[113] for studies of leadership and of national loyalties involving international complications.[114] It has encouraged current research into the methods of information and their effect on various social groups and has promoted studies on child types.[115]

In addition to the foreging broad and general framework UNESCO stimulates and coordinates independently conducted and financed research into social tensions both within and between countries with an attempt to link such work to the research undertaken by UNESCO. Its efforts have been more particularly directed toward the aim of bringing together in the form of syntheses the studies made of social tensions and of disseminating the conclusions of these studies and syntheses especially to universities and other institutions of higher education.[116] In this endeavor UNESCO would aim to reach primarily those who participate in the decision-making process,[117] "decisions that can effect the course of world events toward the maintenance of peace. The people to be reached, first of all, are those in countries that are most influential in world affairs and within these countries they are the people in positions of power or in a position to influence those with power. The objective would be to give

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[113]UNESCO, *Report supra* note 86, at 71.

A useful summary of both past and present efforts to improve textbooks and teaching materials as aids to international understanding as well as recommendations for future courses of action and a comprehensive bibliography will be found in "UNESCO, A Handbook to International Understanding" (1949). The Handbook draws the attention to the importance of textbooks and teaching materials in shaping attitudes toward other nations and their impact upon international understanding. It points out that it is from textbooks that most children obtain a connected view of human history and culture and of the world in which they live. For this reason it recommends that the ideals of human freedom, dignity, equality and brotherhood should be emphasized and that the advances of civilization, the obstacles to human progress, world ideals and heroes, world interdependence, and the need for international organization and cooperation should be made clear. It also stresses the need for a moral code of mutual human behavior and a sense of common responsibility for world conditions. "The treatment of the world's efforts to achieve peace should emphasize the importance of achieving justice through international cooperation and law. The supreme aim is not peace at any price but a just and rational peace with freedom and security under law." (pp. 9, 79); *cf.* UNESCO, FUNDAMENTAL EDUCATION, COMMON GROUNDS FOR ALL PEOPLE (1947); U. S. Library of Congress, Reference Department, European Affairs Division, Textbooks: Their Examination and Improvement. A Report on International and National Planning and Studies (1948); *cf.* also J. J. QUILLIEN, TEXTBOOKS IMPROVEMENT AND INTERNATIONAL UNDERSTANDING (1948); K. G. SAIYIDAIN, EDUCATION FOR INTERNATIONAL UNDERSTANDING (1948).

Valuable data concerning recent educational developments throughout the world is contained in UNESCO, INTERNATIONAL YEARBOOK OF EDUCATION (1950), Int'l Bureau of Education Publ. No. 131 (1950).

[114]UNESCO, *Report, supra* note 86 at 71.

[115]*Id.*, at 71.

[116]UNESCO, *Records, supra* note 94, at 40; *cf.* UNESCO, Budget Estimates, *supra* note 94, at 149.

[117]"Decision" has been defined as "a choice that is supported by a relatively high degree of potential coercion." See LASSWELL, DEMOCRACY THROUGH PUBLIC OPINION 10 (1941).

these people the knowledge and attitudes rquired for making intelligent decisions."[118]

While UNESCO was the first specialized agency of the United Nations to pay increasing attention to "the minds of men" where "wars originate," another specialized agency, the World Health Organization, encountered problems of a more or less congenial nature relating to the creation of a healthy society in which healthy personalities may develop. The experience of recent years has clearly demonstrated that the activities and reactions of mentally ill, and maladjusted personalities are dangerous[119] and contagious[120] and often play a significant part in precipitating social upheavals and catastrophes, especially if these persons happen to reach high positions of power and authority.[121] An improvement in the mental health conditions of a society would help to increase the number of integrated, wholesome individuals capable of making friendly contacts with others.[122] The Government participating in the International Health Conference in New York in 1947 have realized the far-reaching significance and world-wide implications of mental health in the creation of harmonious relations among the peoples, and entrusted the World Health Organization in its Magna Charta with the special task of fostering "activities in the field of mental health, especially those affecting the harmony of human relations."[123]

In discharging its constitutional function, WHO has attempted to define the long-term objectives for a mental health program on a world-wide scale,[124] aiming at "the development for all peoples, of as favorable an environment for mental health as the application of existing knowl-

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[118]See Laves, *supra* note 6, at 169; *cf.* LASSWELL, *op. cit. supra* note 117, at 131: ". . . strategic task of guiding the will of the community toward non-destructive policy, depends upon non-destructive leadership, and this, in turn, is favored by the prevalence of genuinely democratic characters in the nation as a whole."

[119]Abrahamsen makes an attempt to interpret the minds of Hitler, Goering, Goebbels, Himmler, Quisling and Laval and shows that they all had markedly maladjusted personalities. See D. ABRAHAMSEN, MEN, MIND AND POWER (1945).

[120]It has been pointed out that the mental health or ill-health affects not only the person involved but also the people in his immediate environment. "Neurotic mothers, delinquent fathers or school teachers with character disorders unwittingly but inevitably visit their unhappiness on those about them . . . Psychological ill-health and the unhappiness it generates is therefore highly transmissible." See WHO *Official Records*, No. 18, p. 78.

[121]Bluemel mentions among the cardinal causes of war the fact that national leadership frequently falls to men of abnormal mental makeup. Under his scheme the psychopath would disappear from public affairs and his plan for a "Selective Government" would establish enlightened leadership in political life. See C. S. BLUEMEL, WAR, POLITICS, AND INSANITY 16, 116, 117 (1948).

[122]The development of mentally healthy, non-destructive human personalities would promote mutual cooperation and understanding. *Cf.* KISKER (ed.), *op. cit. supra* note 57 at 281.

[123]WHO, Constitution, Art. 2, § (m).

[124]On the implications of a mental health program ever undertaken on an international scale see Editorial Comment, *Mental Health on a Global Scale*, 39 AM. J. PUB. HEALTH 662 (May 1949).

edge permits and the acquisition of new knowledge, which will permit of continuous raising of the state of mental health of all peoples" and "the provision for all people of therapeutic facilities which apply the most advanced knowledge in this field."[125] In order to advise the Organization on the ways and means of implementing this long-term program an Expert Committee was established.[126] The Committee approached the possibilities of raising the standards of mental health of the peoples both from the curative and the preventive point of view, and formulated principles and recommendations on mental health problems as they exist throughout the world. It laid particular emphasis upon the encouragement of the application of psychiatric knowledge to the preventive aspect of mental health work especially with respect to those countries where the psychiatric services are still in the early stage of evolution in order to avoid the experience of other countries where preventive techniques were initiated later than therapeutic ones.[127] It was felt that to attempt economic development, and especially industrialization, in an underdeveloped country, without the simultaneous application of psychological, social and anthropological knowledge to the prevention of psychological disorders, would inevitably lead to tensions and threaten the mental health of that considerable proportion of the community whose capacity for psychological adaptation is limited.[128]

The Committee also stressed the importance of the integration of mental health work wherever possible with other WHO programs such as public health administration, education, maternal and child health, nursing, veneral-disease control and made a series of specific recommendations with due regard to the principle of solving problems by application of the best scientific knowledge and measures appropriate to the local situation.[129]

The work and contribution of WHO in the field of mental health to the creation of healthful conditions and environment and UNESCO's attempt at eliminating tensions from the international scene clearly indicates the closely knit implications of the two programs. WHO has recognized the necessity for collaboration and the benefits to be accrued therefrom, consequently the Second Health Assembly approved its cooperation with the United Nations, the Specialized Agencies and Non-Governmental organizations[130] in matters connected with mental well-being

[125]WHO, *Official Records,* No. 18, pp. 79, 80.
zation on the ways and means of implementing this long-term program an

[126]*Id.,* No. 17, p. 11.

[127]Expert Committee on Mental Health, Report on the 1st Session, WHO, Tech. Rep. Ser., No. 9, pp. 6-9.

[128]*Id.* at 20; *cf.* WHO, *Official Records,* No 18, p. 65.

[129]*Id.,* at 6-9.

[130]*E. g.,* the World Federation for Mental Health has been recognized as a non-governmental body for consultative purposes by both UNESCO and WHO. The Federation was established in London in 1948, during the International Congress on Mental Health. 4 INT'L CONG. MENTAL HEALTH 330 (1948).

as these relate to the promotion of the wider harmony of interpersonal relations.[131]

Without elaborating in greater detail on the activities of other Specialized Agencies of the United Nations having a more or less indirect bearing upon our discussion, we may recall that the idea of applying our new mental hygiene insights to the solution of international problems was not confined to the activities of purely inter-governmental organizations, but caught the imagination of private associations as well.

The International Congress of Mental Health[132] must be given the credit for including on its agenda the broad problems of mental health and world citizenship.[133] Out of the deliberations of its Preparatory Commission a Statement[134] emerged which was primarily concerned with "the question of how the resources of mental hygiene might be utilized to develop a world community."[135] While there seemed to be general agreement on the exceeding complexity of this problem and the lack of reliable data, it was stressed that the human sciences "offer the hope of a new approach to the problem of war and a world community."[136] The interest in world citizenship was not of a political nature but centered around the task of considering the social, cultural and psychological aspects of world integration. Mental health, on the other hand, was considered as a "common human aspiration" as a "part of a system of values" which varies according to cultural traditions, economic resources, population pressure and many other factors in each country. It was pointed out that the goal of mental well-being has been enlarged from the concern for the development of healthy personalities to the broader task of creating a healthy environment in which healthy personalities may develop, and in turn, it was recognized that such healthy personalities are indispensable to the creation of a healthy society. The problem then arose as "how to interrupt these self-perpetuating circular systems which prevent the development of a healthy society." In the course of the discussions, increasing emphasis was laid upon the possibilities for changing society and cultural patterns by utilizing the potentialities for adult learning.[137] The main theme of the Congress was expressed in the statement that the concept of mental health must be made "coextensive with world order" and that it is "the ultimate goal of mental health to help men to live with their fellows in one world."[138]

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[131]WHO, *Official Records*, No. 21, p. 25, Doc. WHA 2.26.

[132]The Congress was held in London in August 1948. For its history, development and organization, see 1 INT'L CONG. MENTAL HEALTH (1948).

[133]4 *Id.* at 31 *et seq.*

[134]4 *Id.*, at 285-321.

[135]See Frank & Mead, *The International Preparatory Commission*, 1 *id.*, at 86.

[136]4 *Id.*, at 302.

[137]1 *Id.*, at 85-87.

[138]1 *Id.*, at 87 and 4 *Id.*, at 304.

IV

The preceding survey of the activities and attempts of international organizations though by no means exhaustive, is in itself characteristic of the types of projects that have recently been undertaken with a view to developing and enlarging the still more or less rudimentary and isolated manifestations of world mindedness to a higher level of more comprehensive and conscious identification of individuals with the world community. An examination of these methods and approaches clearly reveals that neither the Tensions Project nor any other project can provide our much troubled world with a magic panacea for the immediate solution of deep-rooted ideological or power-political conflicts. Nor can we expect that the social sciences can discover a ready formula for the elimination of international or other group tensions or the eradication of destructive tendencies in a relatively short lapse of time.

On the other hand, it is equally clear that international problems cannot be successfully tackled on the basis of pure power-political considerations, but have to be examined in the light of the entire framework of the social process with due regard to other equally important value-variables.[139]

The danger of building water-tight compartments around the various disciplines has with the spread of growing specialization greatly increased. The lawyer is likely to regard situations that arise in the course of the exercise of his profession purely in terms of legal theory and interpretation. The political scientist is tempted to think in categories of power relationships and the educator entirely in terms of his discipline, which necessarily leads them to an oversimplification of life and reality.[140]

What we need is a conscious collaboration and exchange of scientific data and information among the various disciplines,[141] a concerted effort on the part of all the sciences concerned with the various factors affecting the "shape and composition of value patterns of mankind as a whole"[142] upon which the scope of our identifications largely depends.

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[139]*Cf.* McDougal, *Law and Power,* 46 AM. J. INT'L L. 102, 107 *et seq.* (Jan. 1952).

[140]See Leighton, *Dynamic Forces in International Relations,* 33 MENTAL HYGIENE 17, 18 (Jan. 1949).

[141]Beaglehole emphasizes the significance of the concept of interpersonal relations and suggests "a better rounded and all embracing study of man-in-situation." See Beaglehole, *supra* note 76, at 78. *Cf.* Wright, *supra* note 37, at 13; *cf.* also *Promotion of Mental Health, International Symposium,* BRIT. MED. J. 556 (Feb. 25, 1950).

On the necessity for applying an integral method to the study of international relations see Verdross-Drossberg, *The Study of International Law in German-speaking Countries,* in UNESCO (comp.) ,CONTEMPORARY POLITICAL SCIENCE 598, 599 (1950).

[142]See LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY 3, 4 (1935).

The significance of the social sciences and their particular impact upon international understanding hardly needs restatement. Since they are concerned with the environment and mental attitudes, which create or destroy feelings of aggressiveness or friendliness between peoples and groups, their possible contribution to our understanding of the implications of world-wide loyalties can hardly be overestimated.

The miraculous advances that have been made in the field of psychology and psycho-analysis concerning our knowledge of man and his behavior, the nature and sources of his prejudices, unconscious motives and emotional dispositions, are beginning to be applied to the study of world affairs. Today more than at any previous time medical science through psychiatry is giving increasing attention to the manifold problems arising in our inter-personal and inter-group relations.[143] While studies in the fields of social psychology may add to our understanding of the phenomena of mass behavior, or the spreading of a mood or an attitude from one person to another,[144] anthropological inquiries may provide us with additional findings that support the belief in the unity and the universal brotherhood of man.[145] Whatever contributions these sciences may make in providing us with new skills or methods, suggestions or insights for the solution of our problems will have to be related to and verified by the findings of studies in the fields of neighboring sciences.[146]

At the present time the total body of our knowledge is far from being complete and there seems to be a tremendous gap between the available information and the data required.[147] Though the efforts of social scientists and the recent attempts undertaken by international organizations may be considered as an encouraging sign, further intensive studies and large-scale scientific inquiries are needed to establish the effectiveness of modern techniques as applied to changing harmful and destructive mental

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[143]*Cf.* Menninger, *The Role of Psychiatry in the World Today,* 104, AM. J. OF PSYCHIATRY 155, 163 (1947); *cf.* also MENNINGER, PSYCHIATRY IN A TROUBLED WORLD (1948); MENNINGER, PSYCHIATRY, ITS EVOLUTION AND PRESENT STATUS (1948).

[144]*Cf.* Brierly, *supra* note 44, at 58; *cf.* also Lasswell, *Psychology and Political Science in the U.S.A.,* in UNESCO, *op. cit. supra* note 141, at 534.

[145]*Cf.* ASHLEY-MONTAGU, *op. cit. supra* note 66, at 127; Wright, *supra* note 37, at 12.

[146]On the significance of combined approaches *cf.* Klineberg, *Phychological Aspects of International Relations,* (STATION & PERRY eds.), *op. cit. supra* note 19, at 248; *cf.* also ZEUNER, *The Coming of Man,* (H. DINGLE ed.), A CENTURY OF SCIENCE 198 (1951).

[147]The application of scientific methods to the study of interpersonal relations is a relatively new phenomenon and it may well take a longer period of time before the social sciences will be in a position to keep pace with the tempo of the development of the others. See Linton, *Present World Conditions in Cultural Perspective.* (LINTON ed.), *op. cit. supra* note 72, at 202 *cf.* LASSWELL & BLUMENSTOCK, WORLD REVOLOTIONARY PROPAGANDA viii (1939); Lasswell, *supra* note 62, at 341; WILLIAMS, *op. cit. supra* note 55, at 104.

attitudes in an effort to clear the way for the development of world-wide loyalties.[148]

Out of historical, sociological and related studies useful inferences could be deduced concerning the impact of narrower loyalties on wider identifications. The types of studies to be undertaken may include inquiries into the conditions and circumstances that made [it] possible to tie people together in the British Commonwealth of Nations,[149] or under the Austro-Hungarian Monarchy. Well integrated and planned research projects may investigate the nature and role of interacting forces that stand in the way of the realization of the Western European unification. Furthermore, we may ask ourselves whether allegiance to the nation state is an indispensable stage in the historical evolution of a community or can it be bypassed and if so, under what conditions? Or, we may ask to what extent do confederations or regional organizations constitute an effective step toward world-wide identifications? What are the conditions that have to prevail if national societies are to develop in the direction of super-organizations? We may raise the question whether there is a greater degree of conflict between world loyalty and national loyalty, than there is between loyalty to local communities and allegiance to larger units of state, nation or confederation. We may inquire what type of loyalties under what conditions do interfere with allegiances of a broader nature? What is the effect of war on the various factors of loyalties and what are the conditions of their peace coexistence?

The list of questions may be expanded considerably. We need to find out more about the role of customs,[150] words[151] and other symbols[152]

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[148]For a brief summary of recent research activities, see Young, *Organization for Research in the Social Sciences in the United States,* 1 INT'L SOC. SCI. BULL., No. 3-4, pp. 99-107 (1949).

[149]Cobban, for instance, classifies the ties that have held the British Commonwealth together under the headings of sentiment, influence and interest. See COBBAN, NATIONAL SELF-DETERMINATION 82 (1945).

[150]Klineberg suggests that the causes of both national differences and similarities should be clarified through more intensive community studies. See Klineberg, *supra* note 146, at 258.

[151]The impact of the use of words and language on identifications has been increasingly recognized. Yet, it has also been pointed out that although "common feelings and common thoughts would seem to imply a common single language . . . a group may form a nation without possessing a common language . . . and . . . a group may speak one language and yet form several nations." See E. BARKER, NATIONAL CHARACTER AND THE FACTORS IN ITS FORMATION 13 (1927).

On the terminological and semantic differences that prevent sympathetic understanding see Lasswell, *Describing the Contents of Communications, supra* note 13, at 113.

[152]Symbols, if used in the proper way, may become important conditioning factors of world loyalty responses. The "vicious circle" character of the endeavor to bring about a world community through the creation of symbols has been emphasized by Levi. He asserts that the "conditioning of emotions toward a world community would be facilitated by the existence of international symbols or institutions, but the symbols and institutions can hardly possess effective reality until there is a community to give them substance." He feels, however, that the "creation of some even

and the new media of mass communication[153] in promoting or hampering social conformity and identification. There must be an exact knowledge of the problems of how common goals, similar demands, expectations, past activities or experiences effect the scope of our allegiances. We have to know how much indulgent or deprivational changes in our value positions widen or lessen the range of our identifications. We have to find out more about the nature and rise of destructive drives in the human personality and the methods by which they can be isolated or held in check. There is need for much more study of the vast fields of the unconscious or nonrational motives effecting the decision-making processes in different countries.[154] Professor Lasswell, for instance, has suggested "a comparison of world elites,"[155] a continuing survey of the "distribution of influence,"[156] and of "the ever shifting trends in the world community."[157]

Other related inquiries will have to shed some light on the extent to which institutional and organizational changes, the development and adoption of new loyalties may provoke psychological and social strains or tensions, and on the measures to be taken to offset or ease these effects. In most general terms we have to know how to manipulate the underlying institutional and value-variables that determine world loyalty responses.

The continuing collection of data[158] and the furtherance of scientific inquiries over a long period of time are only a small fraction of the job

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inadequate symbols and institutions will assist in establishing the community." See LEVI, *op. cit. supra* note 8, at 26.

The improper manipulation of verbal and visual world loyalty symbols may actually hinder the development of the world community. *Cf.* Lasswell, *supra* note 45, at 223.

On the significance of global Symbol Surveys consult LASSWELL, IERNER & ITHIEL DE SOLA POOL, THE COMPARATIVE STUDY OF SYMBOLS 16 et seq. (1952).

[153]The modern world has provided us with striking illustrations of how dictatorial regimes may utilize new technical devices for the purpose of affecting attitudes of great masses of people.

For a description and analysis of propaganda and psychological warfare see P. M. A. LINEBERGER, PSYCHOLOGICAL WARFARE, INTELLIGENCE AND INSIGHT (1948). *Cf.* LASSWELL, PROPAGANDA TECHNIQUE IN THE WORLD WAR (1927).

[154]*Cf.* Dunn, *The Scope of International Relations*, 1 WORLD POLITICS 145 (April 1949).

[155]See LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY 3, 4 (1935). An illuminating enquiry of this type with extensive bibliography has appeared among the Hoover Institute Studies, see LASSWELL, LERNER & ROTHWELL, THE COMPARATIVE STUDY OF ELITES (1952.)

[156]See Lasswell, *supra* note 62, at 348.

[157]This should include both a survey of trends and an appraisal of the factors affecting these trends. Among his various enlightening recommendations Lasswell also suggests Surveys of World Attention and World Attitude. See Lasswell, *supra* note 45, at 224, 230, 231.

[158]*Cf.* Leighton, *supra note* 140, at 21: ". . . single-shot . . . analyses are liable to be misleading . . . What is needed is something like the system of weather stations in which observations and analyses for forward continuously and in which there is both immediate reporting of trends and long-range study of basic process." *Cf.* also Lasswell, *The Policy Orientation*, in LERNER & LASSWELL, THE POLICY SCIENCES 13 (1951).

that is needed. The results of these far-reaching studies of analyzing human behavior will have to be utilized and widely disseminated among the general public through the use of the media of mass communication.

In addition, we must realize that the success or failure of any long-term program leading toward world-mindedness will largely depend on the feasibility of changing attitudes through the enlightenment process.[159] To be effective, the spread of enlightenment will have to start in the early years when human behavior is most adaptable to changes and will have to be directed toward helping children to reach emotional maturity and balance.[160] From the point of view of world citizenship the satisfaction of the child's basic psychological needs,[161] the application of progressive methods for developing the power of critical thought and the selection of emotionally mature teachers have been emphasized as necessary conditions for laying down the foundation for world citizenship.[162]

Moreover, the properly devised and oriented educational programs will have to be extended to the higher education as well. The general curricula of universities and other institutions of higher learning will have to be adjusted to the pressing needs of our contemporary society.[163]

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[159]It has been recognized that the future of mankind lies in the regeneration and moral and spiritual development of the individuals, a job that can be accomplished by proper education. See Das, *Human Rights and the United Nations,* 252 ANNALS 61 (1947).

Wright emphasized the value of a central, world-wide organization with extensive powers of communication for peace education. See WRIGHT, THE CAUSES OF WAR AND THE CONDITIONS OF PEACE 125 (1935); *cf.* EVATT, *op. cit. supra* note 63, at 238.

An educational program leading toward world-mindedness "must stand upon the rock of intelligent self-interest but should be refined and exalted through its constant devotion to freedom, to peace, to justice, mercy and truth." See Greenberg, *Education for World Citizenship,* (BRYSON, FINKELSTEIN & MACIVER eds.), *op. cit. supra* note 81, at 468; *cf.* Silvain, *Pour une réforme Européenne de l'enseignement,* 52 *Revue politique et parlamentaire* 144-154 (Feb. 1950.)

[160]A recently published group report on Abnormal Influences on the Psychology of the Child describes the emotionally mature individual as one who can express his emotions adequately, control his impulses satisfactorily, make social advances and responses readily, recognize the rights, claims and needs of others, adjust adequately to difficult situations, and can assume responsibility.

The report contends that "the individual who is well-balanced and emotionally mature is likely to contribute more to society, and to become a better citizen of the world than the individual who lacks balance or maturity. See UNESCO, TOWARD WORLD UNDERSTANDING, No. 6, p. 27.

[161]The child whose psychological needs are not satisfied may take up an anti-social attitude and may be less likely to adapt himself to the demands of reality. *Id.,* at 29.

[162]*Id.,* at 35, 36.

[163]In the constructive projects for a world organization a great role will be attributed to universities and international scholarships. See Wallace, *Internationalism and Universities,* 5 INT'L J. 43, 47 (Toronto, 1950); *cf.* McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the the World Community,* 56 YALE L. J. 1345-1355 (1947); Sturges, *The Quest for World Law and Order,* 22 TULANE L. REV. 558, 567 (1948); *cf.* also Franklin, *The Teaching of International Law in American Law Schools,* 46 AM. J. INT'L L. 140-143 1952).

On education for intercultural understanding, see NORTHROP, THE LOGIC OF SCIENCE AND HUMANITIES 311-327 (1947).

Courses will have to be offered dealing with the more specific questions of world integration. Special attention will have to be devoted to the particular problems of how to overcome impediments arising from differences in institutional devices, economic, legal, educational and other systems.

Education alone, however, is not enough. The results of scientific inquiries will have to be applied to the mode of our manipulating other equally important value processes and to the way of our affecting changes in institutional structures with a view to bringing about the required responses, with the least possible friction.

It is not the purpose of this inquiry to minimize the towering difficulties which are likely to be encountered in the actual implementation of an over-all program toward world-mindedness. We know that there are wide variations in the educability of the individual, and that apathy and resistence to the enlightenment process and to institutional changes have to be consistently reckoned with.[164] Moreover, the changing of human behavior, social attitudes and institutional patterns, the development of emotionally well-balanced individuals who are capable of making useful and friendly contacts with others may take several generations. Yet the time is pressing[165] and the responsibilities are great.

It is also obvious that the initiation of appropriate measures, their coordination and implementation cannot be left entirely to the often cumbersome machinery and meagre resources of international governmental organizations. The solution of the indicated problems are vital to the interests of those countries which stand for the supreme value of respect for the individual human being. Since the fate of the Western civilization has become inextricably bound to the destiny of the United States, it is of surpassing importance that under her leadership rationally[166] planned[167] and coordinated scientific studies be undertaken and constructive actions be developed transcending and supplementing, if necessary, the activities of international organizations.

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[164]As Levi puts it, human beings are "creatures of habit," they resist to the creation of new institutions or changes in behavior. See LEVI, *op. cit. supra* note 8, at 9.

Brinton draws the attention to the extremely persistent nature of nationalism and to the slow process by which it can be changed. See BRINTON, *op. cit. supra* note 10, at 74.

[165]Too rapid or too slow development of a super-organization may be equally dangerous to peace. See Wright's letter to the Committee on International Relations, 1 INT'L SOC. SCI. BULL., No. 1, p. 23 (1949); *cf.* 25 FOR. POL. REP., No. 9, p. 108 (Sept. 15, 1949).

[166]"A rational policy in relation to world society is one which increases the probability that the goal sought will, in fact, be attained with least sacrifice of well-being, power, wealth, respect, enlightenment and other values." See Lasswell, *supra* note 45, at 224.

[167]*Cf.* McDOUGAL & HABER, *op. cit. supra* note 14, at 1116 *et seq.;* LEVI, *op. cit. supra* note 8, at 198, 199.

It is equally clear that this program should not be forced upon those who are unwilling to participate in the establishment of a free man's commonwealth. But this should be no deterrant. We can still try to achieve a limited or restricted world loyalty or world integration. We can still strive to perfect our own experiment to show the world that by "freedom from persecution and intolerance," by equality of access in the sharing of our democratic values, "by a high standard of living" we can achieve a community where men can live in relative harmony. "Such men will be less quickly stampeded into war. They will guard their hard-won rights and they will combine with others to thwart an aggressor's chances of success. . . ."[168]

Only if the United States assumes the role of enlightened leadership which so suddenly has fallen to her destiny by guiding, directing and manipulating the strategy and tactics for the promotion of world loyalty, with due regard to the entire context of the power processes and interacting institutional and value variables, can we look forward with confidence to the reorganization of the free world as one growing, interdependent community.

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[168]See Binger's remarks, 4 INT'L CONG. MENTAL HEALTH 60, 61 (1948).

REQUIREMENTS FOR CONTINUANCE IN CRIMINAL CASES*

*Earle L. Wingo***

Frequently, after one has been charged with a criminal offense and his case has been set for trial, it develops that, by reason of his illness or the absence of material witnesses, a continuance is not only desirable but essential for the ends of justice. In this situation, unless the reason for such a continuance is promptly and properly presented to the court, a substantial right will be denied to the great prejudice of the accused.

The important question of when and how such a matter should be placed before the trial court is worthy of serious consideration, and when counsel becomes familiar with the exact requirements of the motion for continuance in a given situation, there is then removed all confusion on the subject. Many individuals have been denied a continuance because of insufficient proof or a misunderstanding respecting what is required therefor.

The established rules of procedure, as well as the proof required, in moving for a continuance are subject to the circumstances in each case.

Where Defendent Too Ill To Be In Court

To be entitled to a continuance because of the illness of the accused, medical tesitmony should be introduced through the attending physician to show the nature of the illness, the effect of same upon the defendant, and that his life or health would be endangered by being forced to stand trial at that time. Moreover, it should also be shown by such medical testimony, as nearly as possible, when the accused would most likely to be able to proceed with the trial.

In support of this statement, the Mississippi Supreme Court, in the case of *Johnson v. State,*[1] held that when indicted for an offense, the accused should not be forced to trial when too sick to confer with his counsel, in which case the trial should be continued.

Further, the Court in another case[2] has decided that if the accused is too ill to be present at her trial for misdeameanor, the court must grant her application for a continuance, and a conviction rendered on a trial in her absence will be reversed.

Where Material Witnesses Are Absent

When it becomes known that a material witness for the accused is absent and cannot be present in court to testify, the defendant should

*Note: The above article was prepared from Chapter Eleven of "Mississippi Criminal Law and Procedure", by Earle L. Wingo. Published by Harrison and Company, Atlanta, Georgia. 521 pages. (1952).

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[1]108 Miss. 709, 67 So. 177 (1914).

[2]Hoggett v. State, 99 Miss. 844, 56 So. 172 (1911).

promptly have the witness subpoenaed; he must ask for an atachment if the process on the witness has been served, and he failed to appear; he must apply for a continuance in writing before venire is drawn in a capital case; he must set out in the affidavit the name and address of the absent witness, the facts expected to be shown by him, and what steps have been taken to secure his attendance; he must negative the idea that the witness' absence is with the defendant's consent or procurement; and he must give cause of the witness' absence, if known.

Because of the extreme importance of properly preparing the motion for continuance, the express requirements therefor must be kept in mind. In this motion one must show:

1. That the absent witness would give testimony material to the defense, setting forth the same in detail.

2. That the witness is not present, either because of serious illness, or because he was not found after due diligence in attempting to obtain process of the court upon him.

3. That the testimony of such witness would not be cumulative and can be shown by no other witness.

4. That such witness is not absent because of the accused's consent or procurement, and that he probably will be available at the succeeding term of the court.

5. That the witness is within the jurisdiction of the court, if this be true; and, if out of the State, where he then may be, if known.

Also, one must:

6. Give the home address of the absent witness so that the court will know that he normally lives within the jurisdiction of the court.

7. Ask for an attachment for the witness if process has been served upon him and he has failed to respond thereto.

8. Attach an affidavit to the motion, setting forth therein that all of the matters contained in the motion are true.

9. Present the motion, in writing, at the first opportunity prior to proceeding with the trial. In a capital case, the motion should be filed and presented to the court before a special venire has been drawn, if the fact of absence is then known to the accused or his counsel.

When Must Be Made In Capital Case

Ample provision has been made for the filing of motion for continuance in Mississippi by statute[3] which provides that an application for con-

[3]Miss. Code § 2506 (1942).

tinuance in capital cases shall not be entertained after the drawing of a special venire, except for causes arising afterward, unless a good excuse be shown for not having made the application before.

In support of this statute the Supreme Court has held[4] that a court may refuse an application for continuance on the ground of the absence of any witness who has not been subpoenaed and made his appearance prior to the drawing of the special venire, for cause coming to the knowledge of the defendant after the drawing of the special venire.

In addition, the Court has said further in the case of *Ellis v. State*[5] that a refusal in a murder prosecution to grant a continuance based upon the absence of a non-resident witness was not error where defendant had made no effort to procure witness' presence at the trial and there was no proof that he would likely be available as a witness at any future trial of the case.

Discretion Of Court In Granting Continuances

Granting or refusing continuance is a matter largely within the discretion of the trial judge.[6] A trial judge has broad discretion in granting and refusing continuances, and the Supreme Court will not reverse a case because the trial court refused a continuance unless it is satisfied that injustice has resulted.[7]

Generally, the Court held in *Cruthirds v. State*[8], the granting or refusing of further time to prepare for trial, and the granting of continuances is largely discretionary with the trial judge, but the discretion must be a sound judicial discretion having due regard to the rights of the public and of the defendant.

However, it is also been held that it is a dangerous exercise of judicial discretion to refuse a continuance and postponement of the trial to a future day of the term, where the affidavit alleges material facts, where all diligence has been shown, and where it is averred that the same proof can be made by no other than the absent witness.[9]

Absence Of Material Witness

The absence of a material witness is a good and true cause for continuance on the authority of *Caldwell v. State*[10] where it was said that a motion for a continuance on the ground that a material witness could not be procured after using due diligence should be granted.

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[4] Penn v. State, 62 Miss. 450 (1884).
[5] 198 Miss. 804, 23 So.2d 688 (1946).
[6] See note 5 *supra*.
[7] Parker v. State, 201 Miss. 579, 29 So.2d 910 (1947).
[8] 190 Miss. 892, 2 So.2d 145 (1941).
[9] Long v. State, 52 Miss. 23 (1876).
[10] 85 Miss. 383, 37 So. 816 (1904).

A later case[11] goes even further and states that, at the first term of court after indictment and arrest of defendant, the defendant is entitled to a continuance on account of the absence of a material witness within the jurisdiction of the court.

In further application of this principle, *Walker v. State*[12] holds that a defendant is entitled to a continuance on account of the absence of his wife who is a material witness for him and who is sick and unable to attend.

Again, the denying of a continuance to procure a witness who would testify to material facts was held erroneous where due diligence was shown and the evidence was not cumulative.[13]

Must Show Probability Of Procuring Absent Witness At Later Time

In order to avail oneself of the right to a motion for continuance, it must be shown that the absent witness will be available at a later time. This rule is asserted in the case of *Hodgkin v. State*[14] which states that a refusal of a continuance on the ground of absence of non-resident witness is not error where defendant's evidence did not show that the witness would probably be present at next term of court, but, where a witness who would give material testimony favorable to defendant is absent, the denial of a continuance is held to be error.[15]

Further, in order to promote justice, the Court in *Childs v. State*[16] held that a denial of a continuance to secure a witness to recent threats by deceased was erroneous where proof as to who was the agressor was conflicting.

Testimony Of Absent Witness Must Not Be Cumulative

Where a continuance does not aid the defendant or promote the ends of justice, none will be given. Thus, a continuance will not be granted when the evidence sought to be obtained is cumulative.[17]

The rule is one of standard application and no exception is made in murder cases. *Lambert v. State*[18] holds that a continuance of murder prosecution because of the absence of a witness was properly refused where the absent witness' testimony would have been merely cumulative.

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[11]Knox v. State, 97 Miss. 523, 52 So. 695 (1910).
[12]129 Miss. 449, 92 So. 580 (1922).
[13]Childs v. State, 146 Miss. 794, 112 So. 23 (1927).
[14]172 Miss. 297, 160 So. 562 (1935).
[15]Brooks v. State, 108 Miss. 571, 67 So. 53 (1914).
[16]See note 13 *supra*.
[17]Wells v. State, 18 So. 117 (Miss. 1895).
[18]171 Miss. 474, 158 So. 139 (1934).

In *Bolin v. State*[19] defendants applied for continuance just two days prior to trial, after they had been free under bond for almost three months. The petition averred the absence of two material witnesses, but the testimony of one witness would have been cumulative, and that of the other would have been hearsay, extremely vague, somewhat mysterious and, in part, cumulative. The Court found that the defendants had failed to use due diligence in obtaining a tentative witness and that denial of motion for continuance was not an abusive discretion.

Due Diligence Must Be Shown

In order to avail oneself of the rule regarding continuances, a person must be diligent in attempting to obtain the witness' testimony. The Court in *Osborne v. State*[20] adheres to this view in stating that an application for a continuance of a criminal case for the absence of witnesses must show due diligence in summoning them and continue to use the process of the court.

This rule commands strict adherence in the Mississippi Court(s) and is not relaxed even in murder cases. *Coward v. State*[21] holds that it is not error to overrule a motion for continuance when the defendant has exhibited a lack of diligence on his part.[22] Also, the defendant is duty bound to exercise due diligence where the witness is beyond the jurisdiction of the State, and if he does not exercise same, he will not be heard to complain when his motion is overruled.[23]

To avail oneself of an application for continuance, based on the absent witnesses, there must be continued diligence at every stage of proceeding.[24]

Admissions On Application For Continuance

Continuances are such an important phase of criminal justice that many statutes have been passed concerning it. One of these, Section 2522 of the Mississippi Code of 1942, provides that in all cases of application for continuance, it shall be lawful for the state or the defendant to make any admission of any fact sought to be proved by the other party by any absent witness, and such admission shall have the same effect as if the absent witness or other evidence were present in court, and no more; but if compulsory process will probably obtain the attendance of the absent witness, and the defendants have not had opportunity of obtaining such process, the cause shall be continued, unless the defendants desire a trial.

Where, on a prosecution for murder, there was conflict of evidence as to who was the aggressor, and the only witness as to recent threats made by

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[19]209 Miss. 866, 48 So.2d 581 (1950).
[20]146 Miss. 78, 111 So. 834 (1927).
[21]158 Miss. 705, 131 So. 254 (1930).
[22]Clanton v. State,———Miss.———, 51 So.2d 577 (1951).
[23]Simmons v. State, 206 Miss. 535, 40 So.2d 289 (1949).
[24]Robinson v. State, 178 Miss. 568, 173 So. 451 (1937).

deceased against the defendant, other than members of defendant's family, have been subpoenaed, and were sick with smallpox, a refusal of a motion to continue the case, on the prosecuting attorney's admitting that the witness, if present, would testify as stated in the moving affidavit, was error, as defendant had the right to the personal presence of the witness before the jury.[25]

Accused Entitled To Presence Of Witnesses

In view of the last mentioned statute, the Court in *Montgomery v. State*[26] held that where a defendant charged with assault with intent to kill had not been able to obtain compulsory process to secure the attendance of absent witnesses for whose absence he desired a continuance, and the facts sought to be proved by them were material to the issue of self defense, it was error to deny the continuance on the district attorney's admitting that, if they were present, they would testify to the facts stated in the affidavits for continuance.

Upon further consideration of Code Section 2522, *supra,* the Court in *Walton v. State*[27] has said that regardless of the provision of the statute with respect to admissions on applications for continuances, the defendant, at the first term, was entitled to a continuance to obtain the testimony of an absent witness whose testimony could probably be heard at the next term and who was expected to testify to material evidence, though the state admitted that the witness, if present, would testify to the facts stated.

Reading Of Testimony Of Absent Witness Insufficient

Where the application for continuance includes testimony of an absent, material witness, the reading of this testimony will not cure error in trying the case in that witness' absence.[28]

State Should Admit Truth Of Testimony Of Absent Witness

Where the defendant's wife was the only witness to the facts favorable to defendant, and the state refused to admit the truth of her evidence as set out in application for a continuance because of the wife's illness and inability to attend the trial, the denial of the application was held to be error, though the state admitted that she would testify if present as set out in the affidavit.[29]

Affidavit For Continuance Must Set Forth Testimony

In order to sustain a motion for continuance, the affidavit accompany-

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[25]Watson v. State, 81 Miss. 700, 32 So. 491 (1902).
[26]85 Miss. 330, 37 So. 835 (1904).
[27]87 Miss. 296, 39 So. 689 (1905).
[28]See note 13 *supra.*
[29]See note 12 *supra.*

ing the motion must set forth testimony of the absent witness, otherwise it will not be error to overrule it.[30]

Affidavit Must Show Residence Of Absent Witness

In order to meet the requirements laid down by the Court in *Donald v. State,*[31] the supporting affidavit must state the absent witness' residence or it will be fatally defective and will be properly overruled.

Refusal To Grant Continuance Should Be Made Basis For New Trial

Refusal of defendant's motion for continuance because of the illness of his wife is not reversible error where the motion was not accompanied by a physician's certificate showing the character and nature of illness or whether it was serious enough to divert defendant's attention from the trial; no evidence was introduced during trial showing that refusal was prejudicial, and refusal to grant continuance was not made the basis for the motion for a new trial. Under the circumstances, the Court in *Stokes v. State*[32] decided that the motion was properly overruled.

If defendant's request for continuance because of an absent witness is refused, he must persist in using the process of the court to compel attendance of the witness on trial. If convicted and if an appearance of the witness can not be had, his ex parte affidavit must be presented to the court, if it can be obtained, on hearing of a motion for a new trial.[33]

An accused whose application for a continuance because of the illness of a witness is denied, must show by affidavit on a motion for a new trial what the testimony of the absent witness would have been if he had been present.[34]

The defendant must be vigilant; he must subpoena his witnesses seasonably. Refusal to grant continuances for material witness is not error where there was no effort by defendant to procure the presence of the witness until trial of the case was practically in progress, and a motion for a new trial was not followed up by the affidavit of the absent witness.[35]

The application for continuance should set forth with clearness as to what the absent witness would testify. Such testimony must be material, and, if the application is overruled, the affidavit setting out the evidence should be produced on a motion for a new trial.[36]

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[30]Everett v. State, 147 Miss. 570, 113 So. 186 (1927).
[31]41 So. 4 (Miss. 1906).
[32]172 Miss. 199, 159 So. 294 (1935).
[33]Bone v. State, 207 Miss. 20, 41 So.2d 347 (1949).
[34]Dyrick v. State, 187 Miss. 441, 193 So. 452 (1939).
[35]Thigpen v. State, 206 Miss. 87, 39 So.2d 768 (1949).
[36]Ware v. State, 133 Miss. 837, 98 So. 229 (1923).

No Right Of Prosecution To Cross-Examine Accused

The law relating to cross-examination on application for a continuance is not applicable to criminal cases.[37] The District Attorney is not permitted to cross-examine a defendant on his application for a continuance, and it is error for the court to allow it over the objection of the defendant for defendant has a right to stand on his application.[38]

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[37]Hill v. State, 152 Miss. 708, 120 So. 817 (1928).
[38]See note 37 *supra.*

SOME INTERESTING LAWS OF THE MISSISSIPPI TERRITORY

*Fred J. Lotterhos**

It may be of some interest to lawyers, who must of necessity inform themselves of parts, at least, of present day voluminous statutes,[1] in the course of serving their clients, to take passing note, solely for entertainment, of some of the laws of an earlier time—the Mississippi territorial period. After 135 years or more, it can hardly be expected that the enactments of the territorial government of Mississippi will have any professional value for present day lawyers. Hence, the purpose of this article does not extend beyond an effort to call attention to some interesting provisions of the territorial laws, for casual consideration only, not calling for careful study, nor leading to any practical end.

Mississippi Territory was created by an act of Congress of April 7, 1798.[2] It embraced "that tract of country" bounded on the west by the Mississippi River, on the north by a line running due east from the mouth of the Yazoo River to the Chattahoochee River, on the east by the Chattahoochee, and on the south by the 31st degree of north latitude. Thus, Mississippi, as a territory, began with only a relatively small part of the land that comprises the present state, but with a considerable portion of what is now Alabama. However, in 1804, Congress added to the new territory all of that land lying north of the original territory which is now embraced in Alabama and Mississippi, and later added that part of those two states (as of today) that lies south of the 31st degree. The Mississippi Territory then contained all of the present domain of both states.

The form of government in the new territory was similar to that provided for the territory northwest of the Ohio River. By an act of Congress of May 10, 1800,[3] provision was made for a general assembly in the territory. The territorial government continued in existence until the western part of Mississippi Territory (the same area as contained in the present state) attained the status of statehood on August 15, 1817, when the first

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[1]The Published volume of laws enacted at the 1950 session of the Mississippi legislature contains 988 pages of laws of that session.

[2]STAT. MISS. TER., p. 41 (1816). This reference and other similar references hereinafter made are to a volume published in 1816, entitled: Statutes of the Mississippi Territory; the Constitution of the United States, with the several Amendments thereto; the Ordinance for the government of the Territory of the United States, Northwest of the River Ohio; the Articles of Agreement and Cession between the United States and the State of Georgia; and such Acts of Congress as relate to the Mississippi Territory. The volume was digested by the authority of the General Assembly, and was printed at Natchez by Peter Isler, Printer of the Territory.

[3]*Id.* at 42

Constitution was adopted pursuant to the authority granted by an act of Congress of March 1, 1817.[4]

It is with statutes enacted by the general assembly of the Mississippi Territory that we will be concerned in this article.

Crimes and punishment have always been a problem. Naturally, we find considerable differences in the applicable laws and customs of the early days as compared with the present time.

On April 2, 1799, the territorial governor divided the territory into two counties by proclamation.[5] The southern part was Adams County, and the northern part was Pickering County. By an act of January 11, 1802, the name of the latter was changed to Jefferson County.[6] Commissioners were named to acquire two acres of land "at, or near Hunt's store, on the middle fork of Cole's creek," on which to erect "a court-house, jail, pillory and stocks" for Jefferson County.[7] It was provided that there should be constructed "a strong and sufficient jail of logs" and a court-house. When commissioners were appointed to acquire two acres of land at the "landing of Samuel Gibson," as a seat of justice for Claiborne County, they were directed to have erected "a court-house, jail, stocks, pillory and whipping-post."[8]

This type of equipment was needed, as is shown by the punishments prescribed for some crimes. For grand larceny, the person convicted was required to restore the goods stolen to the rightful owner, or pay the value of such goods, and was to receive "thirty-nine lashes, upon his, or her bare back," and was to stand in the pillory, at the discretion of the court, not more than two hours per day for three days.[9] But the treatment accorded one who stole "any horse, mare or gelding, foal or filly, ass or mule" was more severe. He was required to make restitution to the owner, and was to be fined "at the discretion of the jury" in a sum not exceeding $500, and "moreover receive thirty-nine lashes on his or her bare back, well laid on, and be branded on the face, or in the right hand as the court shall think fit with the letter T and be imprisoned for a term not exceeding twelve months."[10]

The punishment prescribed for any person guilty of wilful and corrupt perjury, or of procuring any person to commit such perjury, was to pay a fine not exceeding three hundred dollars, at the discretion of the jury, to stand in the pillory two hours, to have thirty-nine lashes on the bare back,

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[4]MISS. CODE pp. 23-37, 59-60 (1798-1848).
[5]STAT. MISS. TER., p. 87 (1816).
[6]*Id.* at 88.
[7]Act of January 27, 1802, *Id.* at 89.
[8]Act of March 12, 1803, *Id.* at 91.
[9]Act of February 10, 1807, *Id.* at 213.
[10]*Id.* at 214.

and thereafter to be incapable of giving testimony in any of the courts.[11] Perjury is, of course, a crime which directly undermines the administration of justice, and which should be sharply curbed if the courts are to maintain their dignity and effectiveness. It may be that the punishment of territorial times (especially the lashes on the bare back) would deter the average perjurer more adequately than does the more or less remote possibility of a penitentiary sentence.

The punishment for violation of the Sunday laws was a small fine.[12] The punishment for "profanely cursing or swearing" was the forfeiture of fifty cents, and for drunkenness, one dollar.[13] For failure to pay the sum provided for these last two offenses, the guilty person was to "be set publicly in the stocks, for any space of time not exceeding four hours."[14]

There were many offenses, for which the death penalty was enforced; for example, selling a free person as a slave, robbery, burglary, stealing a slave, counterfeiting, fighting or assisting in a duel resulting in death, and, of course, murder, rape and arson.[15] The manner of inflicting the death penalty was by hanging.[16] Imprisonment seems to have been little used as a punishment as compared with today—on doubt, because of the difficulty and inconvenience of maintaining adequate prisons.

It is noteworthy that the property of a person convicted of any crime was made "liable and subject, in preference to all other demands whatever, (except dower and jointure) in the first place, to the discharge of the expenses incurred by the territory or county, in the prosecution and conviction of such offender; and in the next place, to what restitution or reparation may be adjudged to the injured party."[17] Also, it was provided that if the territory should fail in the prosecution of any "inferior offense" the court might order the prosecutor to pay the costs, if the prosecution appeared to be frivolous or malicious.[18]

The punishment for negroes was in most instances different from that otherwise provided by law. When convicted of an "offense, not punishable with death by this act . . . . he or she shall be burnt in the hand by the sheriff in open court, or suffer such other and corporal punishment as the court shall think fit to inflict, except where he or she once had benefit of this act, and in those cases . . . . shall suffer death."[19] The penalty imposed on a negro for giving false testimony was exceedingly barbarous. He was

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[11] *Id.* at 217.
[12] Act of March 12, 1803, Id. at 232-233.
[13] *Id.* at 233.
[14] *Id.* at 234.
[15] Act of February 10, 1807, *Id.* at 212, 213, 214, 216, 220.
[16] *Id.* at 222.
[17] *Loc. cit.*
[18] *Id.* at 222.
[19] *Id.* at 223

to have one ear nailed to the pillory, there to stand for one hour, and then to have the ear cut off, followed by the same procedure with the other ear, and, moreover, to receive thirty-nine lashes at the public whipping post, or such other punishment as the court shall think proper, not extending to life or limb.[20]

All crimes were not specifically described by statute. It was enacted that "every other felony, misdemeanor, or offense whatsoever, not provided for by this or some other act of the general assembly, shall be punished as heretofore, by the common law."[21] The amount of any fine to be imposed on a convicted person was assessed by the jury.[22]

Some effort was made to care for the families of convicts, but the means provided would hardly be approved by today's social service agencies. The law stated that when it shall appear that there can be "no reasonable expectation that the family of the prisoner will be brought up in honest courses . . . . . the overseers of the poor . . . . . shall . . . . . bind out the children of such person, to honest, respectable and virtuous citizens, for the same periods of time and under the same conditions for their instruction and maintenance, as in other cases of orphans and poor children."[23]

Means were available to prevent prisoners from escaping, in the persons of citizens called to duty by the sheriff. Whenever the sheriff had cause to suspect that any accused person committed to jail would attempt to escape, he could apply to "any justice of the quorum of the county," who was required thereupon to issue his warrant for "a sufficient guard for securing such prisoner or prisoners, so long as he, she, or they continue in said jail; to be paid by the public, after the rate of fifty cents for each man per day."[24]

The statutes restrictive of activities on Sunday, and punishing those who violated them, were more detailed than present statutes on this subject, (though on the whole strikingly similar). "No worldly business, or employment, ordinary or servile work, (works of necessity or charity excepted) nor shooting, sporting, hunting, gaming, racing, fiddling or other music for the sake of merriment, nor any kind of playing, sports, pastimes or diversions" were allowed on Sunday. This law applied to all persons of "fourteen years or upwards." No store could be kept open, nor goods sold. It was provided that "no waggoner, carter, drayman, drover, butcher, or any of his slaves or servants, shall ply or travel, with his waggon, carts or drays; or shall load or unload any goods, wares, merchandise or produce; or drive cattle, sheep or swine" on Sunday. No process could be served,

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[20] *Id.* at 223-224.
[21] *Id.* at 221.
[22] *Id.* at 222.
[23] *Id.* at 226.
[24] Act of February 6, 1807, *Id.* at 227.

except by a special procedure when the person to be served was about to leave the territory. Furthermore, it was forbidden, in much the same language as in the present statute,[25] to "shew forth, exhibit, act, represent, or perform . . . . any interludes, farces or plays of any kind, or any games, tricks, juggling, slight of hand, or feats of dexterity and agility of body, or any bear-baiting or bull-baiting, or any such like shew or exhibitions whatsoever."[26] All forfeitures and fines under the Sunday laws were to be paid "one half to the informer and the other half to the treasurer of the county . . . . for the use of the poor."[27] But the applicable statute of limitations as to these offenses was ten days.[28]

The territorial liquor laws were more liberal than those in force now. Owners of distilleries were "authorized to sell spirits of their own distillation, in any quantity not less than a quart."[29]

In order to receive a license to keep a tavern, a person had to be recommended for the purpose by six or more reputable freeholders of the county. The license, issued by the county court, was good for one year from its date and until the next county court after expiration of the year. On receiving the license, the applicant was required to pay to the clerk, in open court, twenty dollars for the use of the county. Before the license was issued to him, the applicant was required to enter into bond, with sufficient sureties, in the penal sum of three hundred dollars, conditioned "for constantly keeping and providing said tavern with good, clean and wholesome diet, and lodging for travelers, and stabling, provender, or pasturage for horses, for and during the term of his license; and for the due observance of all laws and ordinances, which are or may be in force in this territory, in relation to tavern keepers." The law further provided that, for non-compliance with the condition of the bond, it was lawful for any person, "in the name of the governor, to sue for and recover, in any court having jurisdiction thereof, the penalty of the said bond; and apply one half to his or her own use, and the other half to the use of the county."[30] A method was provided whereby, between court terms, an applicant could obtain a certificate authorizing him to retail liquors until the next county court, to which he was required to present his certificate "for approbation," and if the court approved the certificate the clerk would then issue a license good for one year.[31]

Several special statutory provisions applied to tavern-keepers. At least once a year the justices of the county courts were required to fix the

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[25]Miss. Code § 2370 (1942).
[26]Act of March 12, 1803, *Id.* at 232-234.
[27]*Id.* at 234.
[28]*Id.* at 235.
[29]Act of January 15, 1814, *Id.* at 252.
[30]Act of March , 1803, as amended, *Id.* at 397.
[31]Act of December 3, 1810, *Id.* at 399-400.

rates and prices to be paid at all taverns in their respective counties for "liquors, lodging, diet, stabling, provender, and pasturage." Within twenty days after the rates were fixed, each tavern-keeper was required to "set up in his public entertaining room, in a conspicuous place, a fair table of rates, certified by the clerk of the court . . . . there to be constantly kept, exposed to public view as aforesaid, under the penalty of twenty dollars." A fine was specified for charging more than the price allowed.[32] This statute might well be termed the ancestor of OPA.

It was contrary to law for a tavern-keeper "to permit or suffer any cock-fighting, or playing with cards or dice, or to keep any gaming table, of whatsoever denomination, or any kind of gaming whatsoever, in his or her inn, or tavern, or in any out-house, tenement, yard or garden belonging thereto;" or to give, sell or deliver any kind of spiritous, fermented or strong liquors to any apprentice, servant or slave, without consent of the master; or to "presume to sell any rum, brandy, wine or other kind of intoxicating liquors, to any soldier or soldiers" without permission from his or their officers; or to furnish, sell or give any intoxicating liquor to any Indian, without special permission in writing from the governor; or to "presume to sell rum, brandy, or such like spirits, that is adulterated with water." It was further provided that if any tavern-keeper should be convicted of "being drunk, in his own inn or tavern," his license should immediately become void.[33]

A fine was imposed on any person presuming to "keep a tippling house, or sell rum, brandy, whiskey, taffia, or other spiritous liquors, in less quantity than one gallon . . . . or sell any strong beer, porter, cider or wine, in less quantity than four gallons, without a license first obtained, as aforesaid." But there was a proviso to the statute that nothing therein contained should be construed "to prevent merchants and shop-keepers from retailing liquors, in any quantity above a quart; so that the same be not drunk with his or her consent or privity, in their stores, or on the premises where they reside or have their stores."[34]

In territorial times there was no prohibition, but neither was there unregulated sale of liquor. Tavern-keepers, who sold liquor by the drink, were licensed and bonded, and subject to detailed control. Store-keepers, who sold by the bottle, as in the modern package store, could not allow any drinking on the premises.

The territory also had laws regulating the quality of food and drink sold. For example, it was set forth that if "any butcher, baker, brewer, distiller, tavern-keeper, retailer of wine or spiritous liquors, or other person

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[32]Act of March 4, 1803, as amended, *Id.* at 397-398.
[33]*Id.* at 398-399.
[34]*Id.* at 398.

or persons shall sell, offer or expose to sale . . . . any tainted, putrid or unwholesome fish or flesh, or the flesh of any animal dieing otherwise than by slaughter; or slaughtered when diseased for the purpose of being sold or offered for sale; or any tainted, putrid or unwholesome bread, or other cooked or raw food of any kind whatever; or any adulterated and unwholesome wines or spiritous liquors" he shall pay a fine, for each offense, in the amount of five dollars. This same statute forbade bakers to sell any bread "without having the bakers sirname and the initials of his christian name legibly marked on each and every loaf, cracker, cake, piece or division of any kind of bread." For violation of this provision, the baker not only paid a fine but suffered a forfeiture of "all such unmarked bread, so offered for sale, for the use of the poor."[35] It must have been rather difficult to comply with the latter part of this statute in all instances, particularly without benefit of present day wrappings and containers.

It is obvious that bread and meat were more completely the common diet in those times than now, as they are almost the only foods specifically mentioned in the pure-food acts of the territory. Of course, wine and liquor were carefully safeguarded. The importance of bread as the basic food is further disclosed by a statute applicable to millers. It sets forth that every water grist mill, grinding for toll, was declared to be a public mill. The tolls, or rates, for grinding were to be fixed by the county courts; and it was provided that "all mills shall grind according to turn, and shall well and sufficiently grind the grain brought thereto, if water will permit." It was added, however, for the protection of the miller, that it should be "in the power of any such owner to grind, or cause to be ground, his own grain at any time he thinks proper, anything in this act to the contrary notwithstanding."[36]

Grist mills and certain other processing plants were of such importance to the community that they were granted the power of eminent domain. It was the law that a person owning land on only one side of a water course, and "desiring to build a water grist-mill, saw-mill, cotton-gin, or other useful water works on such lands, and to erect a dam across the same for working said mill," could apply for a "writ of *ad quod damnum*," whereupon seven freeholders would be summoned to determine the damage to the property of others, and to designate one acre of the land of such others to be used for an abutment, and needed land for a ditch or canal. The full procedure was set out, whereby the person proposing to construct the mill, upon paying the damages, acquired fee simple title to the one acre of land across the stream for abutment for the dam and as much as was necessary for the ditch or canal.[37]

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[35]Act of December 27, 1815, *Id.* at 327.
[36]Act of December 7, 1811, *Id.* at 344-345.
[37]Act of December 14, 1812, *Id.* at 345-346.

Some reference has already been made to the laws against gambling in taverns. There was also a very detailed act similar to the present statute forbidding gambling, and specifying that "if any person or persons shall . . . . play at any tavern, inn, store for the retailing spiritous liquors, or in any other public house, or in any street, highway, or in any other open place, at any game or games, with cards or dice, or at any gaming table commonly called A B C or E O, or any gaming table known or distinguished by any other letter or by any figures, or rowley powley table, or at any rouge and noir, or at any faro bank, or at any other gaming table or bank of the same, or the like kind, under any other denomination whatever, or shall bet on the sides or hand of such as do game," he shall be subject to a fine.[38] Another statute provided for the destruction of all tables set up for the purpose of gaming contrary to law. But, strange to say, in the face of the detailed prohibition of the first act described, the latter enactment stated that "nothing in this act, nor in the act to prevent the evil practice of gaming, to which this is an amendment, shall be construed to extend to persons casually attending or adventuring at any gaming table, but to those only who shall be the real or apparent owners or holders of such gaming table, or other machine or means used in gambling."[39]

It was forbidden that any person or persons conduct a lottery, under pain of a fine of one thousand dollars, "unless he, she or they be authorized by law."[40] But lotteries seem to have been in fairly good repute, since authority of law was not uncommonly granted, as indicated by the following examples. When commissioners were appointed for "opening and clearing the river Pearl", they were empowered "to raise by way of lottery the sum of two thousand dollars for the purpose of improving the navigation of the said river, on such scheme as they may deem most expedient."[41] A lottery was also authorized for the benefit of Jefferson College, the trustees of which were permitted to raise by that means a sum not exceeding ten thousand dollars.[42] But more surprising was the enactment of a statute enabling a church to conduct a lottery in aid of its building fund. This act was in part as follows: "As the first Presbyterian church in the city of Natchez has been so far built by the voluntary contributions of piously disposed citizens, and as the amount of these contributions have not been quite sufficient to pay the person who contracted to build the same, the president and trustees are hereby authorized to raise by lottery a sum not exceeding five thousand dollars for the purpose of enabling the trustees to pay the contractor in full, inclose, level and improve the church lot, com-

[38]Act of February 4, 1807, *Id.* at 235.
[39]Act of December 17, 1811, *Id.* at 238.
[40]Act of December 3, 1810, *Id.* at 237.
[41]Act of December 23, 1815, *Id.* at 306-307.
[42]Acts of May 3, 1802 and March 4, 1803, as amended, *Id.* at 311.

plete the steeple and to do and complete whatever may yet be undone in and about the said church."[43]

Changing times, and economic progress, naturally modify the need for some laws, and leave their marks in the statutes. Those regulations which are beneficial under original conditions pass from the scene as those conditions cease to exist. This fact is illustrated by the statutes once existing to take care of the nuisance created by cotton seed. It was provided that every owner of a gin located in, or within one quarter of a mile of, any municipality was required to "enclose, remove or destroy all the cotton seed which falls from said gin, so as to prevent the putrefaction thereof;" and further that such owners were restrained from "throwing or letting the cotton seed fall from their gins into any stream of water or watercourse whatever, except the Mississippi, Tombigbee, Alabama, Amite Rivers, and the waters of Bayou Sara."[44] Another statute required every gin holder to enclose his gin "with a good and sufficient fence, five feet high, and so close that no hog of any size can get through the same; and every such gin shall be enclosed so as to include all the cotton seed which may fall from, or in any wise appertain to said gin."[45] Now that the cotton seed industry has developed into economic importance, based on the valuable products coming from the seed, it is difficult to realize that originally cotton seed was a waste material and constituted a nuisance requiring strict laws for its control.

Imprisonment of debtors was known in Mississippi Territory. A general statute providing for county buildings did not overlook accommodations for debtors incarcerated for non-payment. It was set forth that there should be erected in every county "a good and convenient court-house, for the legal adjudication of causes: and a strong and sufficient jail or prison, for the reception and confinement of debtors and criminals; well secured by timber, iron gates, bolts and locks: and also a pillory, whipping-post, and so many stocks, as may be convenient for the punishment of offenders. And every jail so to be erected, shall consist of three apartments at least; one of which shall be appropriated to the reception of debtors."[46] Persons imprisoned for debt were given more humane treatment than were prisoners convicted of crime, in that they were given the liberty of the jail yard (which could not exceed ten acres in extent), provided they made bond that they would not escape.[47]

It was required that measures be taken to secure prisoners from "escape, sickness and infection" and to have the jails "cleansed from filth and vermin." The sheriff was enjoined to keep "separate rooms for the sexes,

[43]Act of December 27, 1815, *Id.* at 370.
[44]Act of March 3, 1809, *Id.* at 84.
[45]Act of November 27, 1810, *Loc. cit.*
[46]See Note 15 *supra* at 93.
[47]*Id.* at 372-373.

except where they are lawfully married." The jailer was directed to provide "proper meat and drink for all criminals committed to the jail of the county, if such prisoner have no other convenient way of supplying themselves with provisions, which shall always pass to them through the hands of the keeper." But in the case of persons, imprisoned in a civil action, the jailer was required "to admit to the wicket grates, or small window of the prison . . . . any person who may come to administer to the wants of such prisoner, by furnishing him or her with meat or drink; which shall be conveyed through such window or grate, that the security of the prison be not too frequently exposed by opening the doors thereof."[48] It appears that the civil prisoner was required to furnish his own food and drink, while in jail.

It seems that there was quite a problem in early Mississippi, resulting from "fire-hunting." Laws to prohibit this practice may be considered as the first development of a conservation program. It was unlawful "to hunt with fire, in the night time, within four miles of any settlement." As indicating the importance attached to the law, it was specially provided that if a person summoned to give evidence against one accused under this act "shall refuse or neglect to give such evidence, the person so refusing or neglecting shall be committed to the jail . . . . until he or they shall give testimony against the said offender." It was further required that the captains of the several companies of militia cause this act to be read "at the head of their respective companies, twice in every year."[49]

In present times we are familiar with compulsory military service. It may be of interest to note that the territorial government required its citizens to serve in the militia for the safety and order of the community. The militia consisted of one brigade, which was divided into regiments, battalions and companies. Each company consisted of sixty-four privates, and was "officered by one captain, one lieutenant, one ensign, four sergeants, four corporals, and two musicians." It was provided that the commanding officers of companies "shall continually enrol every free white male, who shall have been ten days in their respective beats, and who shall be above the age of eighteen, and under the age of forty-five years, and shall give notice to such person of his enrolment." This statute set forth, in addition, that every persons enrolled "shall within three months thereafter, furnish himself with a good firelock of some sort, and with a cartridge box, or shot pouch containing two spare flints and ten rounds of powder, and ball at least, unless such person shall make oath that he cannot procure them without impoverishing himself, or family." Each commissioned officer was required, within the same time, to equip himself with "a sword, or hanger" and to uniform himself as the governor might prescribe.[50]

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[48] *Id.* at 371-372.
[49] Act of February 10, 1803, *Id.* at 308-309.
[50] Act of January 22, 1814, *Id.* at 333.

The statute on militia was rather detailed in regulating musters of the troops, courts-martial, and other phases of the military organization. Regiments and battalions mustered annually, and companies once in every two months or oftener. It is interesting to note one or two sections of the act. It provided that any officer "may put into confinement for the day, any bystander that shall interrupt a muster, drill, or court martial, and any person enroled, appearing at any muster, or drill, shall be ordered into the ranks, and if he refuse, shall be put in confinement for the day, and fined . . . . and no person shall be exempted as an invalid, unless a regimental court martial shall certify that he is wholly unfit, and unable for service, and in case such court have doubts, it may require the opinion of the regimental surgeon; as soon however as such inability be removed, such person shall be again ordered to duty." Also, the militia was subject to call into federal service in a manner similar to the National Guard today. It was stated that "all militia called into actual service, shall be paid, rationed and governed as the United States' troops are, and shall be subject to the rules and articles of war, as established by the United States, whether such militia be accepted into the service of the United States or not."[51]

It is not surprising that in the early times, amounts of money provided for various purposes were small, as compared with the present. An illustration of the difference is the amount paid to legislators. The president of the legislative council and the speaker of the house were entitled to receive four dollars, and other members of the general assembly, three dollars, for "each and every day's attendance" and "at the commencement and end of every session, three dollars for every twenty miles of the estimated distance by the most usual road, in coming to, and returning home from the place where the general assembly shall sit, and in that proportion for a shorter distance."[52] The annual compensation of the auditor of public accounts and of the territorial treasurer, including office rent and stationery, was at one time seven hundred and fifty dollars;[53] but later their salaries were reduced to six hundred dollars per year.[54]

There is an interesting record of arrangements made for a temporary state-house at one time. In 1814 the governor was requested "to rent a house in the town of Washington for the accommodation of the next session of the general assembly . . . .and to cause such alterations to be made therein as to him may appear necessary for that purpose; and the house so rented by him may in the recess (except the largest room) be occupied by the proprietor, and the room so excepted shall be appropriated exclusively during that time to the safe keeping of the furniture and papers of the gen-

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[51] *Id.* at 334-339.
[52] Act of December 24, 1812. *Id.* at 287.
[53] Act of December 23, 1809, *Id.* at 408-409.
[54] See Note 52 *supra* at 413.

eral assembly."[55] The secretary of the territory was instructed to purchase a library for the use of the legislature. It was to include, in addition to the Acts of Congress and digests of the laws of the several states, three dictionaries, a Bible, a law dictionary, "Smith's Wealth of Nations, Montesquie's Spirit of Laws, Vattelle's Law of Nations, Tucker's Blackstone," a book on constitutions of the several states, and "The Federalist."[56]

The laws applicable to the construction and maintenance of highways and bridges are of some interest and merit attention. Roads were to be at least twenty feet wide, and causeways and bridges at least twelve feet wide. The overseers of roads were directed "to have completely cut all trees and stumps, not to exceed six inches above the ground, and pared round the edges, in the highways, under their care." When a bridge was required over any place where the overseer and his assistants could not conveniently make it, the court of the county was empowered and required to contract for the building, keeping and repairing thereof.[57] Provision was made for toll bridges where the width and rapidity of streams made it too burdensome to build and repair bridges by a tax on the inhabitants. The revenue from the tolls fixed by the court was granted to the builders of such bridges, their heirs and successors, for such number of years as the court might agree upon. The persons receiving the revenues from toll bridges were required to keep them in repair at their sole expense.[58] When the courts contracted for the building and repairing of any bridge, it was provided that they "shall advertise the same at least forty days previous to making such contract, which shall be with the lowest bidder, he or they giving bond and security for the true performance of the contract."[59] After all, this is nothing more than a simple outline of the essence of today's method of letting a public contract. But most of the road work was not done under contract. It was performed by the men of the territory, in person, under the supervision of road overseers.[60]

The territory had laws on weights and measures. The treasurer was required to procure a set of each. The set of weights was to be "according to the standard of the United States, if one be established, but if there be none such, according to the standard of London." It was provided that the weights, measures and scales should be deposited with the treasurer, to serve as a general standard of weights and measures in the territory. A set of weights and measures, compared with the general standard, was to be placed in each county, and it was a punishable offence for any person to sell

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[55]Resolution of December 27, 1814, *Id.* at 289.
[56]Act of November 29, 1815, *Id.* at 289-90.
[57]Act of March 1, 1805, *Id.* at 293.
[58]*Loc. cit.*
[59]Act of March 1, 1808, *Id.* at 298.
[60]See Note 57 *supra* at 294-295.

any commodity by weight or measure not corresponding to the county standard.[61]

As has been stated, the times change, and with the times, statutes change. But it is remarkable to observe how many of our fundamental laws are substantially the same in 1952 as they were in the territorial period. Little effort has been made in this review to outline the broad field of statutory law from 1798 to 1817 and to show the basic similarity to present day statutes. Rather the principal effort has been to call attention to a few particular laws which are of passing interest, either because they give a glimpse of life and customs in the territory, or because they tend to hint at the beginning of some statutory scheme which has now developed into greater scope. As indicated at the outset, the object has not been to aid the lawyer in his work, but merely to entertain him by opening the window for a few minutes on a view of laws of the past.

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[61]See Note 38 *supra* at 428-429.

FEDERAL TAX ADVANTAGES DERIVED UNDER PROPER PLANNING OF LIFE INSURANCE AND ANNUITIES

*Joseph Berman**

One of the most popular forms of investment is life insurance; nevertheless, too little consideration is given to the tax problems involved therein. The law generally treats life insurance generously, but there are a great number of pitfalls that trap the unwary. In order that this can be avoided it is essential that we know the advantages to be gained by it and the disadvantages that we must avoid, and from that knowledge both the insured and the beneficiary can profit. The growing use of annuities opened up numerous tax questions, many of which still remain unanswered. The applicant for an annuity contract must face and know the problems therein involved.

Are you familiar with the fact:

1. That your client's beneficiaries can lose some of the benefits under their policies through taxes?
2. That the gain in taking a cash surrender value of a policy can be converted into a capital gain?
3. That a joint and survivor annuity contract can be very costly taxwise?

Life insurance policies and endowment contracts offer an attractive means for tax planning. The income tax law offers three tax advantages not granted to other investments:

1. Even though premiums paid for a life insurance policy or endowment contract annually earn an interest or profit amounting to 2-3%, the owner is not immediately taxed on it. Only a few other investments such as tax exempt obligations and savings bonds enjoy an equal advantage.

2. Even though the policy matured, the excess proceeds over the paid-in amount, which is the result of accumulated investment profits, will not be taxed at all, if received as a result of the death of the insured; otherwise the excess will be taxed. But the tax can be deferred to such time as taxpayer's income condition may be such as to cause his payment of a minimum tax on the increment. Savings bonds do not enjoy this advantage.

3. Where the policy becomes payable because of death of insured, its value can be increased by the tax advantage to be derived by taking the proceeds in installments. The total amount payable in installments is

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increased because of the interest factor computed on the proceeds. This amount also will be received tax-free.

Therefore an insured client whose policy matures during his life, and was taken out during his best productive years, and while he was in a high tax bracket, can postpone, if properly planned, the paying of taxes until later years when most likely he will be in a lower tax bracket.

The beneficiary who is entitled to the proceeds of the policy on insured's death, will receive a tax-free income for life if he decides to avail himself of such option.

The tax law is unfavorable to annuity contracts. Under the present 3% rule it is often an impossibility for the purchaser of an annuity contract to get back his original investment tax free. The Treasury has therefore suggested that the cost of such contracts be amortized over the life expectancy of the annuitant.[1] Therefore from a tax standpoint the annuity is not an advantageous method of investment.

There are instances in which in spite of its tax disadvantages, an annuity contract is desirable, as where a single individual or a married couple without children, whose wealth is insufficient to provide an adequate income otherwise, enter into such an annuity purchase. It is also advantageous to employers in financing employee retirement arrangements.

The income tax problems connected with life insurance concerns us with the taxation of the proceeds of the policies of our clients. The proceeds are divided into two classes: (1) Proceeds paid on account of the death of the insured, and (2) Proceeds paid prior to the death of the insured.

The first class is generally exempt and the second is usually exempt to the extent of the premiums paid. The transfer of a policy may also affect its ultimate tax treatment.

Other income tax problems affecting life insurance are: (1) the right to deduct premiums paid on the policy, (2) the payment of premiums by an employer on an employee's policy, including group insurance, (3) the use of life insurance in alimony arrangements, and (4) life insurance trusts.

Dividends received under insurance or annuity contracts, resulting from returns of premiums and dividends of mutual life insurance companies, may be credited against current premiums,[2] and are not subject to tax unless the amounts already received on the policy exceed the premium or other consideration paid.[3] Such dividends are used to reduce the cost of the policy in computing any gain on the receipt of the proceeds.

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[1] *The Income Tax Treatment of Pensions and Annuities:* Division of Tax Research, Treasury Department, December, 1947.

[2] Sec. 29.22(a)-12.

[3] Sec. 22(a) (2) (A).

Dividends paid before maturity on a single premium or paid up policy are also tax exempt in a similar way.[4] A dividend paid after the maturity of the policy under one of the settlement options is not exempt.[5] Dividends on War Risk or National Service Life Insurance are exempt.[6]

Where an employer pays the premiums and takes a deduction in cases of group insurance policies, dividends received by him are taxable.[7] If the dividends are used to reduce premiums due, or to increase the insurance fund, they will not be subjected to taxes; the deduction allowed will be limited to the reduced premiums.

Dividends otherwise exempt, left with insurance companies at interest or to pay for the purchase of additional paid up insurance are not taxable. In such case the interest paid on the dividends is taxable when received. The dividends used to buy additional insurance, though it reduces cost for the purpose of determining a gain on the proceeds of the policy when received, will serve as the cost of the addiitonal insurance proceeds.

Accumulated dividends and post-mortem dividends paid to the beneficiary after the death of the insured are most likely not taxable. Even though paid after maturity of the policy, they arose prior to the death of the insured and as such would be tax exempt; or they can be considered part of the proceeds of the insurance and exempt on that ground; therefore they are not taxable "excess interest dividends."

Where several employers combining to fund a group insurance plan for their employees through a trust arrangement, the taxability of dividends received by the trustee would depend on the arrangement made. If the trustee is nothing more than an agent for the various employers, they would be taxed on the dividend. Employers will not have to account for the dividends where the agent's obligation is to use such dividends for obtaining additional insurance or reducing the contributions made by the employers.

Proceeds of a life insurance policy received as a result of the death of the insured are excluded from income and are not taxable to the recipient,[8] and it does not matter whether the proceeds are received in a single amount, in installments, or otherwise. Nor does it change in any way if the payments are received by the estate of the insured or by an individual, partnership or corporate beneficiary or made directly to a trust.[9]

It is not affected in any way by the fact that the beneficiary is also the person who took out the policy and paid the premiums on the deceased's

[4]Helvering v. Edna E. Meredith, 140 F.2d 973 (8th Cir. 1944), *aff'd* T. C. Memo Dkt. No. 109987, 3;31 (1943).
[5]Florence Mae Shelley, 10 T.C. 44.
[6]I.T. 3294, C.B. 1939-2, 151; Tr. Rel. S. 2096, September 3, 1949.
[7]Harris Hardwood Co. Inc., 8 T.C. 874(A).
[8]Sec. 22(b) (1).
[9]Sec. 29.22(b) (1)-1.

life. The proceeds are also exempt, where a creditor collects insurance taken out on the life of his debtor, or a corporation collects insurance on a key employee, etc.[10]

There are three exceptions to the rule that life insurance proceeds paid on death are exempt:[11] (1) Payments are taxable, at least in part, where the policy or the right to the proceeds were assigned or transferred. (2) Proceeds received by a divorced wife in an alimony settlement are taxable. (3) Proceeds left with insurer under a contract to pay interest on it are taxable.

Payments made to beneficiaries under dividend interest or other participation rights are not exempt and not considered proceeds of the policy.

Even though the exemption of insurance proceeds extends to corporate beneficiaries, the proceeds are included in earnings and profits available for dividends and still be taxable as to stockholders when distributed.[12]

Proceeds paid to a partnership are exempt in the partners' hands when distributed because the individual partners just pick up partnership income, as is, for reporting purposes.

The type of policy under which payments are made is not material; it can be term, endowment, 20 payment-life, paid-up 65, whole life, etc. The test is, and the proceeds are tax exempt when paid according to the policy due to the death of the insured. If they are within the above mentioned exceptions, the exemption applies. This exemption has been in the law since 1913, but it is only since 1946 that the sweeping exemption of death benefits payable otherwise than as a lump sum are reflected in the regulations. Prior to it the Commissioner argued for the taxation of the difference between the installment payments and the lower commuted or proportionate value of what would have been paid as a lump sum, and if installment payments were paid only at beneficiary's election they were considered not paid because of the reason of death. The courts turned the Commissioner down and in 1946 he gave up the fight.[13]

If proceeds are left with the insurance company under interest option in which company agrees to pay interest periodically, at a specified minimum rate, with a higher rate paid if earned, the interest beneficiary having the right to withdraw all or part of the proceeds, the interest payment in such cases are taxable income.[14] It makes no difference whether the in-

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[10]U.S. v. Supplee-Biddle Hardware Co., 265 U.S. 189 (1924); Durr Drug Co. v. U.S., 99 F.2d 757 (5th Cir. 1938); H. Norwood & Co. 4 B.T.A. 697.

[11]Sec. 22(b) (1); Sec. 29.22(b) (1)-1.

[12]Sec. 29.115-5; Edwin Cummings v. Com., 73 F.2d 477 (1st Cir. 1934); Delia Golden Ex'rx, 39 B.T.A. 676, *aff'd*, 113 F.2d 590 (3rd Cir. 1940).

[13]T.D. 5515, C.B. 1946-1, 26.

[14]Sec. 22(b) (1).

sured or the beneficiary elects it.[15] Payments of principal are not taxable, either to the interest beneficiary taking them, or to the other beneficiary; it is considered as exempt proceeds.[16]

Installments payments are not exempt where, after receiving payments under interest option, the beneficiary and the company agree to a switch to one of the installment options. It is considered in such cases that the beneficiary purchased the installments and did not receive them as a result of the death of the insured.[17]

The interest option nonexemption extends to any payment plan under which the proceeds are left with the company with only earnings on the principal sum paid to the beneficiary. If the payments do not deplete the principal its nomenclature is immaterial.[18]

Installment options on death of insured are exempt under any of the following settlement options usually provided for in the policy: (1) Where a fixed amount is paid periodically for as long as the principal plus interest lasts.[19] (2) Where all the proceeds plus interest are payable over a fixed period on periodic payments.[20] (3) Where periodic payments are made for life of the beneficiary or two beneficiaries jointly and the survivor for life. In addition, the company may guarantee that whether the beneficiary dies, or not, payment will be made for a minimum number of years or until they equal the original proceeds of the policy.[21]

The installment payments are exempt though predetermined on the basis of expected earnings, or though the policy specifically provides that the computation be made at "an assumed interest rate" of a certain per cent.

If possible, the beneficiary should elect one of the life installment options. Even though there is an investment increment included in the payments, it escapes taxes completely.

Exemption of the proceeds is not affected by who elects the option.[22] Where the beneficiary makes the election the option *must be in the policy.*

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[15]U.S. v. Helen W. Heilbroner, 100 F.2d 379 (2nd Cir. 1938); Edith M. Kinnear, 20 B.T.A. 718.

[16]U.S. v. Helen W. Heilbroner, *supra* note 15.

[17]Lucy G. Law v. Rothensies, 57 F. Supp. 447 (E.D. Penn. 1944), *aff'd* on other issues, 155 F.2d 13 (3rd Cir. 1946).

[18]I.T. 5202, C.B. 1938-2-138; U.S. v. Helen Heilbroner, *supra* note 15.

[19]Mary Claire Heyser, T.C. MEMO. DKT. No. 655, June 14, 1944.

[20]Com. v. Sidney W. Winslow, Jr., 113 F.2d 418 (1st Cir. 1940); Louise E. Kaufman v. U.S., 131 F.2d 854 (4th Cir. 1942).

[21]Com. v. Ella H. Bartlett, 113 F.2d 766 (2nd Cir. 1940); Com. v. Ellsworth B. Buck, 120 F.2d 775 (2nd Cir. 1941); Sarah E. B. Allis v. La Budde, 128 F.2d 838 (7th Cir. 1942); Com. v. Katherine C. Pierce, 146 F.2d 388 (2nd Cir. 1944); Lucy G. Law v. Rothensies, 155 F.2d 15 (3rd Cir. 1946).

[22]Com. v. Sidney Winslow, Jr., *supra* note 20; Com. v. Ella H. Bartlett, *supra* note 21; Sarah E. B. Allis, *supra* note 21; Louise E. Kaufman, *Supra* note 20; Com. v. Katherine C. Pierce, *supra* note 21; Lucy G. Law v. Rothensies, *supra* note 17; Lola G. Bullard, 5 T.C. 1346(A).

Installment payments received are not exempt, where the policy does not provide for the settlement agreed on between the company and the beneficiary, or where the beneficiary does not have the right to elect the option agreed on. In these cases the beneficiary will be considered to have bought the payments with the proceeds due him.[23]

Even though it is not necessary for the insured to elect the mode of settlement, he should make certain that the insurance contract provides for and gives the beneficiary the right to elect the option desired. If the insured selects a settlement option, he should be certain that any supplementary settlement option between the beneficiary and the company will not be considered outside the contract, thereby removing the exemption protection from the proceeds received by the beneficiary.

Payments after death of beneficiary are exempt where installment payments are guaranteed for a minimum period or amount; the payments are then continued to another beneficiary to the end of the period, or the commuted value of the remaining payments is paid as a lump sum to the beneficiary's estate or another beneficiary.[24]

It is questionable whether the second beneficiary could keep the exemption where he agrees with the company to change the method of payment.[25]

Payments made under a family income policy are exempt.[26] It was so held by the Bureau in 1932.[27] Two years later it ruled that the exemption applied only to principal and not to interest.[28] This ruling was revoked in turn by another one in accord with the present rule.[29]

Additional payments made under participation rights are considered taxable by the Treasury. Thus, "excess interest dividend" paid in addition to regular installments were held taxable.[30]

The court ruled that "excess interest dividends" paid were not taxable.[31] In another case it ruled that the payments were made either under the contract or as a gift.[32] In fixed amount type of settlements the tax

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[23]Lucy G. Law v. Rothensies, *supra* note 17.

[24]Com. v. Lila H. Barlett, *supra* note 21; Winifred Wheeler McIntyre, 45 B.T.A. 67, *app. dismissed,* C.C.A. 7, March 9, 1942.

[25]Lucy G. Law v. Rothensies, *supra* note 17.

[26]G.C.M. 10845.

[27]G.C.M. 10845, *supra* note 26.

[28]G.C.M. 13796, CBXIII-2,41(1934).

[29]G.C.M. 23523, C.B. 1943,91.

[30]Sidney W. Winslow, Jr., *supra* note 20; Katherine C. Pierce, *supra* note 21; Townsend Burden *et ux.* T.C. MEMO. DKT. No. 107611, January 30, 1945 *app. dism'd,* (C.C.A.-2) May 15, 1946; Kathleen E. Paul, T.C. MEMO. DKT. No. 105314, January 17, 1945.

[31]Sarah E. B. Allis v. La Budde, *supra* note 21; Louise E. Kaufman, *supra* note 20.

[32]Com. v. Ella H. Bartlett, *supra* note 21.

court ruled the excess dividends payments as not taxable since the beneficiary may never get them because he may die before all the payments are made.[33]

Proceeds paid before death of insured are taxable if they fall into one of the following categories: (1) The proceeds received in a single sum are taxable to the extent that they exceed the cost and exempt to the extent that it represents a recovery of the cost of the policy.[34] (2) The interest payments are taxable in full as ordinary income, when received, in the same way as a lump sum payment, where the proceeds are left at interest with the company. (3) The payments are taxed as an annuity if the proceeds are payable under a settlement providing for installments computed with reference to life expectancy and mortality tables and are payable for longer than one year.[35] All settlements providing for payments for life come under this rule and is not changed where it also guarantees a refund or a certain number of years.[36] (4) Only excess over costs is taxable if and when received, if the proceeds are payable under a settlement providing for *installments payable only for a number of years* without reference to life.[37]

Taxability can be affected by transfer or assignment of right to proceeds. Gain on the surrender or maturity of World War I War Risk Insurance or World War II National Service Life Insurance is exempt.[38]

An insured who paid the premiums and receives the proceeds is taxable for it. If he irrevocably designates another beneficiary before maturity, beneficiary is taxed for it upon receipt of the proceeds. In computing the taxable amount, cost of the policy is the insured's cost.[39]

Insured relinquishing a policy held by him in exchange for a different kind of policy, will be taxed on any excess of the value of the new policy plus any cash received over the cost of the policy turned in. If the new policy has no readily determinable value, there is no taxable gain.[40]

The taxable part of life insurance or endowment contract proceeds received before death is taxable as *ordinary income,* and not as capital gain. The surrender of the policy for the proceeds is considered as a satisfaction of an indebtedness, and not as a sale or exchange.[41] It cannot be considered

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[33]Mary Claire Reysex, *supra* note 19.
[34]Sec. 22(b)(2)(A).
[35]Sec. 29.22(b)(2)-2.
[36]George H. Hess, Jr. v. U.S., 74 F. Supp. 135 (D.C.D. Minn. 1947).
[37]Sec. 29.22(b)(2)-1; George H. Thornley, 2 T.C. 220, *rev'd* on other issue, 147 F.2d 416 (3rd Cir. 1945).
[38]U.S.C.A. Secs. 454a and 816; I.T. 3294, C.B. 1939-2, 151.
[39]I.T. 2635, CBXI-2,63(1932).
[40]So. Op. 55, 3 C.B. 54(1921); C.B. 379, 2 C.B. 77 (1920).
[41]William W. Bodine v. Com., 103 F.2nd 982 (2rd Cir. 1939); *cert. den.,* 308 U.S. 576 (1939); Henry L. Blum v. Higgins, 150 F.2d 471 (2nd Cir. 1045); George A. Hellman, 33 B.T.A. 901; Frank J. Cobbs, 39 B.T.A. 642 *app. dism'd,* 11 F.2d 644; Frank Hawkins, T.C. Memo. Dkt. No. 1642, October 30, 1944, *rev'd* on other issues, 152 F.2d 221 (5th Cir. 1945); I.T. 2567, CBXI-2,39 (1932).

as a sale even though the terms of the policy do not provide for a surrender of the policy at a fixed cash value.[42] Nor can the deal be considered as a retirement of bonds in registered form with interest coupons attached, which would result in a capital gain rather than ordinary income.[43]

That which would be ordinary income on the surrender of a policy can be converted into a capital gain by a sale or assignment to a third party. The sale of an unmatured policy is a sale or exchange and not the satisfaction of an indebtedness. Gain on the sale would be taxable as capital gain.[44] Loss on sale or surrender of policy is not a deductible loss where the amount received on surrender of the policy is less than the cost. The difference is considered as the cost of insurance for the time that the policy was in force, and it does not matter who sustained the loss whether the insured[45] or a corporation that has taken out the insurance on the lives of its officers.[46] Nor does it make any difference if the policy is sold to third persons for an amount equal to its cash surrender value.[47]

A loss was allowed where, because of liens on policies due to the insolvency of an insurance company, the amount received on the surrender of the policy was less than the stated cash surrender value, the difference between proceeds received and the cash value was considered as an allowable loss.[48] One district court allowed a loss on the surrender of an insurance policy.[49] The Tax Court denied its correctness and [it] has never been followed,[50] and at least two circuit courts followed the Tax Court decision.[51] A taxpayer having a gain is treated more favorably than one having a loss in these cases.

In order to determine the taxable amount of a policy it is necessary to compute its cost. Cost is the aggregate total premiums paid in all cases except where the policy or the right to its proceeds are assigned or transferred—reduced by: (1) double indemnity premiums, (2) cost of waiver of premiums, and (3) dividends previously paid on the policy whether left with the company at interest, to buy additional insurance, or otherwise.[52]

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[42]Ralph Perkins, 41 B.T.A. 1225, *aff'd* on other issues, 125 F.2d 150 (6th Cir. 1942).

[43]M. N. Avery v. Com., 111 F.2d 19 (9th Cir. 1940); L. G. Avery v. Com., 113 F.2d 933 (9th Cir. 1940); G.C.M. 18233 C.B. 1937-1-47.

[44]Jules J. Reingold, B.T.A. MEMO. DKT. No. 100878, June 20, 1941.

[45]I.T. 1944, C.B.III-1, 145 (1924).

[46]London Shoe Co. Inc. v. Com., 80 F.2d 230 (2nd Cir. 1935), *cert. den.*, 298 U.S. 663 (1939); Standard Brewing Co., 6 B.T.A. 980.

[47]Century Wood Preserving Co. v. Com., 69 F.2d 967 (3rd Cir. 1934); Keystone Consolidated Publishing Co., 26 B.T.A. 1210.

[48]Moses Cohen, 44 B.T.A. 709(A); William R. Fleming, T.C. MEMO. DKT. No. 3603, March 15, 1945.

[49]Forbes Lithegraph Mfg. Co. v. White, 42 F.2d 287 (D. Mass. 1930).

[50]Keystone Consolidated Publishing Co., *supra* note 47.

[51]Century Wood Preserving Co., *supra* note 47; London Shoe Co. Inc. v. Com. *supra* note 46.

[52]I.T. 2380, C.B.VI-2, 32 (1927); I.T. 2313, C.B. 1940-2-58.

The following amounts are included in the cost: (1) Dividends left with the company to buy additional insurance represent the cost of any additional proceeds.[53] (2) Interest and payments other than dividends received and taxed to recipient and left with the company to increase the amount of future installment payments. (3) Installment payments of proceeds previously received and reported as taxable income prior to 1949 change in the Bureau's methods of taxing proceeds paid in installments over a fixed period of years.

Premiums paid by an employer on an employee's policy, for which the employee was taxed as additional compensation is included in the employee's cost. Where premiums have been discounted through prepayment, only the discounted premium is taken into account. The Bureau has only specifically so held concerning an annuity,[54] but the same rule undoubtedly applies to insurance policy premiums. If the doctrine of constructive receipts is applied, taxpayer will be considered to have received the full proceeds and reinvested them under the selected option. There would then be an immediate tax on excess of the "constructively received" proceeds over the cost as determined above. The "constructively received" proceeds become the "cost" of payments subsequently received.

Interest payments are *taxable in full* when paid or credited where a life insurance policy or endowment contract is surrendered or matures, and all or part of the proceeds are left with the company under an option providing for interest payments on the amount retained.[55] In addition the proceeds themselves (left with the company on which interest is paid) will be taxed under the rule that excess over cost is taxable when received. The time for reporting the taxable amount varies and depends on the provisions of the policy, the agreement covering the election or the time when the election is made.

There was no *constructive receipt* where the policy specifically provided that the proceeds were to be left for life and were to be paid to the beneficiary's estate.[56] In this case, the excess of the proceeds over the cost was taxable to the estate, when received, or to another beneficiary if one was named to receive the proceeds.[57]

In order that we defer tax on the excess of proceeds over cost, election of the interest option should be made before maturity and no right to proceeds at any interest payment date should be retained.

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[53]I.T. 2413, C.B. 1940-2-58.
[54]I.T. 3513, C.B. 1941-2,75.
[55]I.T. 2380; C.B.VI-2,32 (1927), I.T. 2635, C.B.VI-2,63 (1932); I.T. 3202, C.B. 1938-2,138.
[56]Constance G. Frackelton, 46 B.T.A. 283(A).
[57]I.T. 2635, C.B.XI-2,63 (1932).

Life installment options on proceeds paid before death for life are taxable as annuities and the 3% rule is applicable. Each installment is included in income up to amount equaling 3% of cost until the excluded portions of each installment equal cost. Thereafter the entire income is taxable.[58] The cost of the annuity is the aggregate of premiums or other consideration paid.[59]

The taxability of life insurance policy proceeds in life installment payments are not yet settled. Installments for number of years on proceeds paid before death are not taxed as annuities. The taxpayer in such cases is permitted to first recover his cost after which all future payments are taxed in full as ordinary income.[60]

Though the law provides for special tax treatment of annuities, it does not define it. The regulations say that it means amounts based on a computation with reference to life expectancy and mortality tables and payable over a period longer than a year, received in periodical installments, whether annually, semi-annually, quarterly, monthly or otherwise.[61] This definition is not complete since it excludes some payments which the Commissioner and Courts held as annuities, and includes others which they held not to be annuities.[62] The Courts also have not agreed on a standard definition of annuities.[63] An annuity to be taxable as such: (1) Must have been purchased by the annuitant or someone making him a gift of it.[64] (2) There must be periodic payments for life, [65] computed with reference to life expectancy and mortality tables.[66] (3) It must include at least a part return of the original investment and must be in part a return of capital.[67]

Annuities are not limited to contracts made with insurance companies or persons authorized by law to sell annuities.[68] Included as annuities are payments meeting the above requirements if made: (1) under agreements in which property is transferred in return for life payments, (2) to government or civil service employees under retirement arrangements, (3) true employee benefit trusts, and (4) under other employment arrangements.

Pensions, retirement pay, or other compensation paid to an employee

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[58]Sec. 22(b)(2)(A).
[59]See note 58 *supra.*
[60]Sec. 29.22(b)(2)-1; George H. Thornley, *supra* note 37.
[61]Sec. 29.22(b)(2)-2.
[62]William Bodine v. Com., *supra* note 41; Mary J. Ware v. Com., 159 F.2d 542 (5th Cir. 1947); George W. Hooker v. Hoey, 27 F. Supp. 489 (S.D.N.Y. 1939), *aff'd* 107 F.2d 1016 (2nd Cir. 1939); Frederick John Wolfe 8 T.C. 689, *aff'd,* 170 F.2d 73 (9th Cir. 1948), *cert. den.,* 336 U.S. 914 (1949).
[63]Your Federal Income Tax, p. 38 (1949).
[64]Frank H. Mason Trust v. Com., 136 F.2d 335 (6th Cir. 1943).
[65]Mary J. Ware v. Com., *supra* note 62.
[66]George H. Thornley, *supra* note 60.
[67]Com. v. Peter H. Meyer, Jr., 139 F.2d 256; Sol. Op. 160, CBIII-2, 60 (1924).
[68]Maud Gillespie v. Comm., 128 F.2d 140; Mary J. Ware v. Com., *supra.*

after he leaves his employ, given to him gratuitously, are not taxable as annuities. Annuities are taxed under the 3% rule previously discussed. Gains on surrender of annuity contract are taxed as ordinary income.[69] A loss on the surrender of the contract is deductible.[70]

The more common types of life insurance company annuity contracts are: (1) Single premium immediate life annuity, (2) Single premium deferred life annuity, (3) Annual premium deferred life annuity, (4) Joint and survivorship annuity, and (5) Retirement income policy.

The cost of an annuity, for the purpose of applying the 3% rule, is computed in the same way as the cost of a life insurance policy. Its cost is basically the amount of the premiums paid. Dividends reduce the cost of the annuity contract, and are not taxable income. Refund payments after annuitant's death are not taxable under the 3% rule. Annuity contracts in joint and survivorship form are taxable to the original and survivor annuitant under the 3% rule.[71] The method of taxation of combined life insurance and annuity contracts are not settled. In assignments and gifts of insurance policies for *a valuable consideration* to anyone but the insured,—any exemption in such cases is limited to the actual value of the consideration plus any premiums or other sums subsequently paid by the transferee.[72]

Payments of policy loans by a beneficiary will be considered returned by reason of a transfer for a valuable consideration.[73] Transfer of a life insurance policy by assignment to the insured remains completely tax free.[74] Transfers to a beneficiary for a valuable consideration limits the income tax exemption of the proceeds.[75] Transfers to stockholders and business associates are in some cases exempt.[76] Transfers to creditors in payment of debt are exempt to the extent of the amount of the debt plus the premiums subsequently paid by the creditor.[77] Transfers of annuity contracts by way of assignments or gifts are subject to the same rules as transfers of insurance and endowment contracts.[78]

Reciprocal purchases of annuity contracts make taxpayer taxable on the basis of the cost to him of the contract purchased for the other party.[79]

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[69]William W. Bodine v. Com., *supra* note 41; Frank J. Cobbs, *supra* note 41; Simon England, B.T.A. MEMO. DKT. No. 97366, September 20, 1949.

[70]George H. Cohan, 11 B.T.A. 743, *aff'd,* 39 F.2d 540 (2nd Cir. 1930); I.T. 3567, C.B. 1942-2 105.

[71]I.T. 3033, C.B.XV-2, 131 (1936).

[72]Sec. 22(b)(2)(A); Sec. 29.22(b)(2)-3.

[73]Grace R. Maxson Hall, 12 T.C. 419(A).

[74]Lauretta A. Seaman v. U.S., 156 F.2d 719 (7th Cir. 1946); I.T. 5212, C.B. 1938-2,65.

[75]Alex Sawyer Hacker, 36 B.T.A. 659.

[76]Myra H. Pritchard, T.C. MEMO. DKT. No. 112568, October 24, 1944; Charles E. Lambeth, 38 B.T.A. 351(A).

[77]New Jersey Machine Corp., B.T.A. MEMO. DKT. No. 104678, September 5, 1942.

[78]Sec. 22(b)(2)(A); Sec. 29.22(b)(2)-3.

[79]Moses L. Parshelsky, 135 F.2d 596 (2nd Cir. 1943) *rev'd,* 46 B.T.A. 456; *cert. den.,* 320 U.S. 760 (1943).

Switching endowment for life policies results in gain.[80] Life installment options on proceeds paid before death and taxed under 3% rule has been affirmed.[81]

The Tax Court held that a widow of an employee cannot recover cost of annuity premiums where employer paid them all.[82] Cost is unaffected by taxpayer's residence abroad.[83] Bureau agreed that promises of individuals to pay an annuity for life has no ascertainable value when made by an individual not in the annuity business.[84] The Court held that the cash surrender value at the time of transfer plus subsequent premiums paid and collection expenses constitute the cost.[85]

Conclusions

Your clients can cut taxes and save for the future by properly planning as previously shown in my article herein: (1) By concentrating on laying up income for the future through deferred pay. (2) By eking out present take-home pay thereby cutting income taxes as much as possible. (3) By postponing part of taxpayer's income to future, either by a simple agreement or a complicated contract—through an insurance plan. (4) By arranging pensions and profit sharing plans. (5) By setting up stock bonus plans and stock purchase plans. (6) By arranging favorable stock option plans. (7) By arranging that employer assume payments of employees' or executives' business expenses or ease employees' and executives' way to tax deductions. (8) By employer paying some of employees' and executives' personal expenses. (9) Through group term life insurance, where employer pays the premium, the employee designating the beneficiary. (10) By employer's binding agreement to pay up to $5000 to employee's beneficiary upon his death. (11) By group medical care and hospitalization in cases where the employer is allowed to deduct premium payments as a legitimate business expense. (12) By employer furnishing medical examinations and treatment. (13) By employer paying the premiums of employee's accident and health insurance. (14) By permission to use company automobile for personal driving up to 10% of the car's total use. (15) By employer granting on a competitive basis scholarships for employee's children.

The following deferred payment contracts are the safest in avoiding present high tax rates: (1) Agreement by executive or employee to give up deferred compensation if he quits or is discharged before deferred pay is due. (2) Agreement by executive or employee not to compete or work

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[80]Charles Cutler Parsons, 16 T.C. 256.
[81]Bertha M. Fisher v. Com., 181 F.2d 1010 (6th Cir. 1950).
[82]Ella B. Biggs, 16 T.C. 16.
[83]U.S. v. Charles A. Crispin, C.C. Calif. May 1, 1951.
[84]I.R.B. 1950-51.
[85]National Bank of Shawnee Okla., 16 T.C. 54.

for a competitor during his retirement, when he could lure away important accounts. (3) Agreement to remain available for consulting or advisory services. (4) Agreement to waive the deferred pay if the company's earnings or sales, or some other index of its well being falls below certain stipulated levels in the pay out period.

State Bar Section

ANNOTATED RULES OF THE CHANCERY, CIRCUIT, AND SUPREME COURTS OF MISSISSIPPI*

INTRODUCTION

This is a reprint of the "Annotated Rules of the Chancery, Circuit, and Supreme Courts of Mississippi" compiled and annotated by the Mississippi Law Institute of the Jackson, Mississippi, Junior Bar Association and the University of Mississippi Law School under the chairmanship and direction of William N. Ethridge, Jr., who is now a Commissioner of the Mississippi Supreme Court.

Since these rules of procedure before the Courts of Mississippi have been so well received by the practitioners of the State and we have received so many requests for copies of same, the Mississippi Law Journal takes this opportunity to present each member of the Bar with an individual copy of the Rules compiled by the 1949 session of the Mississippi Law Institute.

I

UNIFORM RULES OF PRACTICE AND PROCEDURE IN THE CHANCERY COURTS OF MISSISSIPPI (1936)

RULES CONCERNING COURT PROCEEDINGS

Rule 1

Proceedings Must Be Orderly and Dignified. All proceedings in the Chancery Court, whether in term time or vacation, shall be conducted with due formality and in an orderly and dignified manner, without disturbance or confusion of any sort. The counsel, parties and witnesses, must be respectful to the court and to each other. Bickering or wrangling between counsel or between counsel and witness will not be tolerated. Applause or demonstrations of approval or disapproval, and the use of profane or indecent language in the presence of the court, are prohibited. In addressing the court during a trial or argument counsel should use the customary phrases, and should not address him by name or as "Judge" or "Chancellor". While reading any book or paper to the court, or making any argument, counsel should stand, unless specially excused from so doing by the Chancellor. Y. and M. V. Railroad v. Kirk, 102 Miss. 41, 58 So. 710 (1912), suggestion of error overruled, 102 Miss. 41, 58 So. 834 (1912), Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939). See also Griffith, Mississippi Chancery Practice Sections 84 et seq. (1928).

Rule 2

Officers Must Be Present in Court. During a term of court the sheriff and clerk, in person or by competent deputies, must be present in the court room when the court is in session, to perform such duties as may be required of them by law or the direction of the Chancellor. The court reporter shall be present in person at each term, and at such other times and places in vacation as the Chancellor may direct, to perform the duties of court reporter.

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RULE 3

Sheriff Must Keep Court Room Clean and Comfortable. During each term of court the sheriff must see that the court room, library, judge's chamber, witness rooms and toilets are kept in a clean and comfortable condition.

RULE 4

Clerk Must Have Papers and Dockets in Court Room. The clerk shall, during each day of the term while the court is in session, have and keep in the court room, or in an office adjoining, the file of papers in each matter or cause then pending in the court, and also all dockets he is required to keep, including the general docket.

RULE 5

Officers, Witnesses and Solicitors Must Be Prompt. When any matter or cause has been set for, or adjourned to, a particular day or hour, all officers, parties, witnesses and solicitors whose presence is necessary for the trial shall be on hand promptly at the time fixed. Any negligent or willful failure to obey this rule which shall cause delay shall be punished by such fine as to the Chancellor may appear to be commensurate with the particular offense.

RULES CONCERNING PLEADINGS

RULE 6

Address of Pleadings. The address of all pleadings, accounts and other papers filed in any cause or proceeding shall be to the Chancery Court of the County, and not to the Chancellor.

RULE 7

Pleadings Must Be Filed Before Presented. All pleadings, accounts and other papers in any cause or proceeding must be filed with the clerk of the proper court before being presented for consideration or decree thereon. But bills or petitions for the issuance of writs of *ne exeat,* injunction or *habeas corpus,* or petitions concerning any matter to be heard in vacation, wherein a fiat, as distinguished from a decree, or decretal order, is requested, may be presented to the Chancellor, for his fiat, or for his direction setting the same for hearing, before being filed.

RULE 8

Pladings Must Be Endorsed. Every pleading, account or other paper in any cause or proceeding shall, before it is offered to the clerk for filing, have endorsed on the back thereof the style of the cause of proceeding, the nature of the pleading or paper, whether original bill for divorce, petition for sale of land, demurrer, answer, or the like, and the name of the person or persons offering the same for filing. And the clerk shall not receive or file any paper not so endorsed.

RULE 9

Blanks In Pleadings Must Be Filled In. All blanks contained in any pleading must be properly filled in according to the fact or facts before being filed with the clerk or presented for consideration by the Court or Chancellor. If the pleader does not know, and is unable to learn, the necessary fact or facts to enable him to fill in such blanks accurately, he must so state in his pleadings.

RULE 10

Pleadings Must Be Paragraphed. Each of the several facts on which a complainant may rely for relief, shall be set forth in his bill of complaint in a separate paragraph, so far as can be conveniently done, and each paragraph shall be numbered consecutively. The defendant shall answer the bill in like numerical order, and may plead to the fact or facts stated in each such paragraph of the bill, any proper affirmative defense thereto. Or the defendant may answer the bill paragraphically, and then plead such affirmative matters of defense to the bill as a whole as he may deem advisable or proper. But in such case each of the several facts relied on as in affirmative defense shall be stated in a separate paragraph, so far as can be conveniently done, and so lettered consecutively as to distinguish the matters therein pleaded from those previously admitted or denied in response to the bill. And the same rule shall be observed in regard to cross bills and answers thereto. Any failure to comply with this rule may be taken advantage of by motion to strike such defective pleading.

RULE 11

Delay In Answering. If after a cause is otherwise triable by law the defendant shall obtain leave to answer the bill and thereby delay the trial beyond the term, he shall, on motion of the complainant, be taxed with all costs accrued to the time of granting such leave, unless good cause be shown why it would be inequitable so to do.

RULE 12

Amendments During Trial Term. Where either party during the term at which a cause is triable, or during the trial thereof, shall obtain leave to amend his pleadings concerning any material matter, which the opposite party is not prepared to meet, such opposite party shall, if he so requests, be entitled to a continuance, and the party so making such amendment shall, on motion of the opposite party, be taxed with all costs accrued to the time of granting such leave, unless special circumstances of the case make it inequitable so to do. Jackson v. Lember, 83 Miss. 27, 35 So. 306 (1903); Russell v. Denson, 98 Miss. 859, 54 So. 439 (1910).

RULE 13

Trial Not Delayed Because Demurrer Is Overruled. The complainant shall not be delayed of a trial in any case because a demurrer is overruled. If, in such a case, the defendant has failed to file his answer with his demurrer, he shall, if the complainant so insists, be required to answer within such time as will not delay the trial beyond the term.

RULE 14

When Answer In Divorce Case Required. Where the wife is defendant in a divorce suit she must file her answer or other proper defense to the bill before presenting her application for suit money or attorney's fees. In no case will suit money or attorney's fees be allowed unless it shall appear that she intends, in good faith, to defend the suit.

RULE 15

Motions For Security For Costs. All motions for security for costs must be filed and presented not later than the second day of the term next after process has been served on the movant. Otherwise such motion will be overruled unless good cause be shown why this rule was not complied with.

RULES CONCERNING TRIALS

Rule 16

Causes Set For Trial—Order of Precedence. On the first day of the term, or at such other time as the Chancellor may designate, the docket will be called and all litigated matters or causes will, on request of counsel, be set for trial on a day certain during the term. Cases set for trial shall have precedence over cases not set. No case so set will be tried until on or after the day it is set for trial, except by consent. The Court will try all cases so set in the order of their setting; and if any case is not reached on the day it is set for, it shall have precedence over all cases set for subsequent days of the term. If a case has been set for trial, and for any reason is not tried when reached, it shall lose its precedence over all cases that may have been set, but shall retain its precedence over cases that have not been set. The Chancellor may, if deemed advisable, reset the docket during the term. Probate matters, causes heard *ex parte,* and cases not set for a day certain will be heard at any time during the term when the court is not otherwise engaged.

Rule 17

Stale Cases Dismissed On Call Of Docket. When the docket is called for setting cases for trial the Chancellor may, in his discretion and of his own motion, dismiss for want of prosecution, all cases that have been continued at the instance of the complainant, or by consent, for two or more terms unless the same be then set for trial on a day certain of that term.

Rule 18

Vacation Business—Rule of Precedence. Where the Chancellor has, by order or custom, set apart one day of each week for hearing vacation matters at his office in the City or Town of his residence, all vacation matters coming before him at such time and place shall have precedence over all the business of any term of court that may be then in session, and not finally adjourned. At all other times during any term of court the business of the term shall have precedence over all vacation matters presented to the Chancellor from other counties.

Rule 19

When Rule is Invoked—What Required. Where the rule is invoked on the trial of any cause the interested parties or their representativs who may be excused therefrom must testify before any other witness is offered in his or their behalf, or must retire from the court room during the axamination of his or their witnesses. In case there be several complainants of defendants the rule shall apply to them while their co-complainants or co-defendants are testifying. Wilson v. Peacock, 111 Miss. 116, 71. So. 296 (1916).

Rule 20

Corroboration—When Required. In all uncontested divorce cases, and all other matters *ex parte,* where under the practice of the court proof is required, the testimony of the complainant or petitioner seeking relief, must be substantially corroborated by other wintesses, in all cases where from the nature of the case, the allegations of the bill or petition, or the testimony of the complainant or petitioner, it shall reasonably appear that other persons know the truth about the matters of fact in question.

Rule 21

Cloud of Witnesses—What Done. The practice of summoning numerous witnesses to prove the same fact or set of facts often serves merely to increase the costs

and consume the time of the Court. In such cases the Court or Chancellor may, in his discretion, tax the per diem and mileage of all such unnecessary witnesses against the party causing them to be summoned whether they be called to testify or not. And in all cases the mileage and per diem of all witnesses who are not called to testify shall be taxed against the party causing them to be summoned, unless good cause to the contrary be shown.

RULE 22

Examination of Witnesses. The examination of witnesses shall be limited to the direct examination, the cross examination, and the re-direct examination concerning matters brought out on cross examination. But counsel for either party may be permitted, on request, to inquire about new matters pertinent to the issues, which may have been inadvertently omitted, in which event opposing counsel may also inquire concerning the same matter. In all cases the examination must be conducted in an orderly and decorous manner without interruption from opposing counsel, except for the purpose of interposing objections. Counsel and the witness must be courteous to each other, and in no event will the examination be prmitted to degenerate into a wrangle. If a witness shall attempt to evade answering any proper question the Court will, on request of counsel, require the witness to answer.

RULE 23

Objections To Testimony—Rulings Thereon. All objections to testimony must be made to the Chancellor, not to opposing counsel. The objection must be specific rather than general. If requested by the Chancellor counsel offering the testimony must state the purpose for which it is offered and counsel objecting thereto must state the reasons for his objection. If the objection be overruled counsel may enter a general objection to all other testimony about the same matter with the same effect as if he had objected to each question in reference thereto. If the objection be sustained for any reason other than to the form of the question, counsel may not ask any further questions about the same matter. If the Chancellor shall in any case, reserve his ruling, counsel interposing the objection shall make a note thereof and renew his objection at the conclusion of the testimony, otherwise he shall be deemed to have waived his objections. No exception to the ruling of the Court need be made or noted by the court reporter.

RULE 24

Depositions and Exhibits Offered in Evidence—What Done. It shall be the duty of the court reporter to make a note in the stenographic record of all depositions offered in evidence in the order of their introduction, and also a note of all exhibits and the order in which they were offered, and to mark them for identification. When a deposition or exhibit has been offered in evidence it shall be delivered to the court reporter who shall safely keep it during the trial. When the trial is concluded the court reporter shall securely bind all such depositions and exhibits together, in the order of their introduction in evidence, and deliver them to the Clerk of the Court where such matter or cause was pending, who shall thereafter safely keep the same. No person may take any such deposition or exhibit from the custody of the court reporter or clerk, as the case may be, after the same has been offered in evidence. Jordan v. Miss. Central Railroad, 107 Miss. 323, 65 So. 276 (1914); Horton v. Miss., 157 Miss. 371, 128 So. 103 (1930).

RULE 25

Examination of Adversary Witness. If either party shall call his adversary as a witness he may inquire about any matters pertinent to the issues as though such witness were on cross examination. At the conclusion of such examination such ad-

versary witness may be examined by his own counsel or withdrawn and offered as a witness in his own behalf at a later stage of the trial. But in neither case may counsel for such adversary witness exercise any of the privileges of cross examination. If such adversary witness be present at the trial it shall not be necessary to have him summoned as a witness before calling him to testify.

RULE 26

Only One Solicitor for Each Party May Examine Witness. Only one solicitor for each party to the cause may examine any witness except by permission of the Chancellor. Anywhere several complainants or defendants whose rights and interests are identical shall employ different solicitors the same rule shall apply. But where several complainants or defendants whose rights and interests are separate and distinct have employed different solicitors, then one solicitor for each of such several sets of complainants or defendants may examine any witness.

RULE 27

Leading Questions Prohibited in Matters Heard Ex Parte. In all uncontested divorce cases and other matters heard *ex parte,* counsel for the complainant or petitioner seeking relief, must not ask leading questions nor exercise any of the privileges of cross examination.

RULE 28

Conference with Witnesses. Counsel for each party shall confer with his witnesses before beginning the taking of testimony in behalf of his client. But this rule shall not apply to witnesses who are inaccessible before that time.

RULE 29

Agreements of Counsel. Oral agreements of counsel may be made in the presence of the Court and noted on his docket, or an order then entered in accordance therewith. Agreements made during the progress of a trial may be dictated to the court reporter and noted in the stenographic record. All other agreements should be reduced to writing and filed among the papers in the case. The Chancellor will not decide any dispute between counsel concerning any oral agreement not so made in his presence nor noted in the stenographic record, nor undertake to enforce it in any respect. Rockett v. Finley, 183 Miss. 308, 184 So. 78 (1938).

RULE 30

Earwigging the Chancellor Prohibited. No person shall undertake to discuss with or in the presence or hearing of the Chancellor the law or the facts or alleged facts of any litigated cause then pending in the court or likely to be instituted therein, except in the orderly progress of the trial, and arguments or briefs connected therewith, nor attempt in any manner except as above stated, to influence his decision in any such cause or matter. Any person who shall violate this rule, knowing that such conduct is prohibited, shall be guilty of a contempt.

RULE 31

Argument of Counsel. The Court or Chancellor may dispense with argument in any case; but he may require counsel to argue or brief the law and facts, either or both, in any cause or matter, and shall not be bound to decide the same until that duty has been performed to his satisfaction. And in all cases counsel must be prepared to argue the case as soon as the taking of testimony is concluded. The Court or Chancellor may specify the points of law or fact on which he desires argument and regulate the order and limit the length of oral arguments. In all cases where briefs are

requested by the Chancellor copies thereof must be delivered in person or by mail, to opposing counsel. Any negligent or wilful failure on the part of counsel to fully argue or brief any question when requested by the Chancellor will be considered a grave discourtesy.

RULES CONCERNING OPINIONS

Rule 32

How Chapter 252 Laws of 1934 May Be Availed Of. In all cases where it is desired that the Chancellor shall find the facts specially and state separately his conclusions of law thereon, a request therefor must be made either in writing, filed among the papers in the cause, or dictated into the court reporter's record and called to the attention of the Chancellor before he has decided the case; otherwise the right to such finding shall be deemed to have been waived. And if after such request has been made the Chancellor shall render an opinion either oral or written, then such opinion shall be held to be a sufficient finding under the requirements of the statute, unless before a decree based on such opinion is signed a written request be filed and presented to the Chancellor for additional findings stating specifically the points of ultimate fact and law upon which such additional findings are desired. But such request shall not contain any argument of brief; nor will any argument be heard thereon unless requested by the Chancellor. Kline v. Sims, 113 So. 190 (Miss. 1927).

Rule 33

Opinion a Part of Record. The Chancellor shall not be bound to render a formal opinion in deciding any cause except as required by the preceding rule; but he may, at his election, render an opinion either orally or in writing. If he shall render an oral opinion it shall be taken down by the court reporter who shall transcribe the same and submit it to the Chancellor for correction and approval. In either event the opinion so rendered shall be filed among the papers and become a part of the record in the cause without any order or direction to that effect. Kline v. Sims, 113 So. 190 (Miss. 1927).

Rule 34

No Interruption While Rendering Opinion. While the Chancellor is rendering an oral opinion in any matter or cause he shall not be interrupted by any one. After he has concluded, counsel for either party may make such suggestions or request such further findings of law or fact as may be deemed proper. But the right to make such suggestions or requests shall not be construed to give the right to reargue the case or any part thereof. If the Chancellor desires reargument in whole or in part he will request it.

RULES CONCERNING DECREES

Rule 35

Decrees—Form of Caption. Every decree shall show the number and style of the cause at the top and have a caption showing the nature thereof, whether decree pro confesso, decree approving second annual account, final decree of divorce, or as the case may be.

Rule 36

Decrees—Contents and Form. Every decree shall adjudicate such facts as to show that the Court has lawful authority to render it, and every final decree shall dispose of all the material issues presented by the pleadings. In every case where relief is granted the several items or elements thereof shall be stated in a separate

paragraph, which shall be numbered consecutively from one upward. Every decree shall be so drawn as to be definite and certain in all its terms and provisions. In all litigated cases the final decree shall tax the costs as the Chancellor may require and direct the issuance of appropriate process for its enforcement. No exception to the action of the court may be embraced in any decree, but the party adversely affected thereby shall be deemed to have duly excepted thereto.

RULE 37

Consent Decrees Must be Okayed. Every consent decree must be okayed by counsel for all parties to the suit who may be interested in or affected thereby before being presented to the Chancellor for his signature.

RULE 38

Decrees Must Be Submitted to Opposing Counsel When. In all litigated matters or causes the solicitor who shall draw the decree shall submit the same to opposing counsel for criticism before presenting it to the Chancellor for his signature.

RULE 39

Decrees Must Be Promptly Presented to the Chancellor. When the Chancellor has announced his decision in any cause of matter, counsel in whose favor the decision may be, shall promptly prepare and present a decree for his signature.

RULE 40

Decrees Must Be Delivered to Clerk. As soon as a decree has been signed by the Chancellor it shall be promptly delivered to the clerk of the proper court for record in the minute book. Any person to whom any decree may be entrusted by the Chancellor for delivery to the clerk, who shall either wilfully or negligently fail to promptly deliver it to the clerk shall be guity of a contempt.

RULES CONCERNING PROBATE MATTERS

RULE 41

Solicitor Must be Retained. Every executor, administrator and guardian must, upless he is licensed to practice law, retain a solicitor or firm of solicitors to represent, advise and assist him during the whole term of his office, whose compensation will be fixed or approved by the Court or Chancellor. When a solicitor has once appeared for such a fiduciary, in any matter or cause, he may not withdraw or abandon the employment, except by consent of the Court or Chancellor, as well as the client. However, if he shall be or become negligent or unfaithful, in any respect, he may with the consent of the Court or Chancellor, be discharged. But the practice of employing different solicitors, at the will of the fiduciary, during the course of the administration will not be tolerated.

RULE 42

Fiduciaries and Solicitors Must Be Diligent. Every executor, administrator and guardian must be diligent in the performance of his duties; and his solicitor must see to it that publication for creditors is promptly made, that inventories, appraisements, accounts and all other reports and proceedings are made, done, filed and presented within the time required by law, and that the estates of decedents are wound up and distributed as speedily as may be reasonably possible. For any failure to observe this rule the Court or Chancellor will impose appropriate penalties.

RULE 43

Clerk to Make List of Probate Matters Prior to Each Term. At least two weeks prior to each regular term of court, or of the probate term when so designated by special order, the clerk shall make up, in numerical order, a complete list of all probate matters or causes then pending in the court wherein inventories or appraisements then due have not been filed, or wherein annual or final accounts are due or will become due at such term; and shall also notify, by mail, each attorney of record and each executor, administrator and guardian of those matters requiring his attention at that term. And such list showing what is due in each such matter or cause, and the name of the solicitor, shall be delivered to the Chancellor on the first day of the term.

RULE 44

Money and Securities of Estates Must be Kept in Bank. All money belonging to the estate of any ward or decedant shall be kept on deposit, to the credit of the executor, administrator or guardian, as the case may be, and all stock certificates, bonds, and other securities negotiable by delivery, belonging thereto, shall be kept in a safety deposit box, in some solvent bank in this state.

RULE 45

Statement Appended to Annual Accounts. Every executor, administrator or guardian shall append to each annual account, as a part thereof, a list or statement of all assets, real and personal, of the estate then in his hands or under his control. And if any part thereof shall consist of money, bonds or other securities negotiable by delivery, then such statement shall also show the name of the bank where the same is deposited or kept, to which shall be attached a certificate signed by an officer of the bank that such money and bonds or other securities are then on deposit or kept in such bank. In case any of such assets shall consist of loans made by him, or his predecessor in office, then such statement shall show to whom and when each such loan was made, the amount remaining unpaid, how secured, whether all taxes have been paid on the property mortgaged or pledged as security for the loan, and whether or not in his opinion the security is sufficient.

RULE 46

What Vouchers Must Show. Every disbursement shown by any account of an executor, administrator or guardian must be supported by proper vouchers, which shall conform to the requirements of section 1733 of the Code of 1930. Every such voucher shall consist of a receipt or cancelled bank check showing to whom and for what purpose the money was paid; and if paid under an order of the Court or Chancellor, that fact shall be stated on the voucher, showing the date thereof and the minute book and page where recorded. All vouchers for claims paid which arose during the lifetime of a decedent or the sanity of a lunatic shall show that the claim was properly probated, allowed and registered.

RULE 47

Lost Vouchers—How Substituted. In case of the loss or destruction of any original voucher the executor, administrator or guardian may procure and present for allowance a duplicate receipt from the person or corporation to whom the money was paid or the property was delivered, which shall show on its face that it is a duplicate of the original voucher so lost or destroyed. In case he shall, for any reason, be unable to procure such duplicate he may present for allowance a copy of such lost or destroyed voucher, and make proof of the fact of the payment of the money or delivery

of the property shown thereby; and also the loss or destruction of the original voucher and why he is unable to procure a duplicate. Thereupon the Court or Chancellor may, if the proof be sufficient, enter a special decree declaring such copy to be a legal voucher for such payment of money or delivery of property, as the case may be, and allow the same as though the original had been produced.

RULE 48

Claims Arising After Death of Decedent. Claims arising after the death of a decedent, such as funeral bills, expenditures for monuments, attorney's fees, widow's allowance, and the like must be approved by the Court or Chancellor before payment, otherwise payment thereof will be at the risk of subsequent approval by the Court or Chancellor as to the propriety or reasonableness thereof.

RULE 49

Allowance For Support of Ward. Every petition for an allowance for the support of a ward shall show the amount of his estate then on hand, the amount of his monthly or yearly income, the amount of the previous allowance, if any, and the reasons for making the particular allowance.

RULE 50

Petitions For Authority to Make Loans or Investments. Every petition for authority to loan or invest the funds of a ward, shall show the amount to be loaned or invested, the kind and description of the security offered or investment proposed and the value thereof; and in case of a loan to whom and the time for which it is to be made, and the rate of interest it is to bear. In all cases where a loan is proposed the affidavits of two or more credible persons touching the value of the security offered must be attached to the petition or filed with the papers in the cause, or witnesses produced before the Court or Chancellor.

RULE 51

Petitions For Authority to Compromise Claims For Wrongful Death or Injury. Every petition for authority to compromise and settle a claim for wrongful death or injury shall set forth the facts in relation thereto and the reason for such compromise and settlement and the amount thereof. The material witnesses touching the facts concerning the injury or death and the damages resulting therefrom, shall be produced before the Chancellor for examination. Where counsel representing the petitioner has investigated the matter and advised settlement, he shall also appear and give testimony touching the result of his investigations.

RULE 52

Petitions For Commissions. Every petition by an executor, administrator, or guardian for the allowance of commissions, or for compensation for extra services and expenses, shall show the total amount of the estate coming into his hands, the total amount disbursed, the balance on hand, the nature and extent of the service rendered and expense incurred by him, and the total amount theretofore allowed to him on account thereof.

RULE 53

Petitions For Allowance of Attorney's Fees. Every petition by an executor, administrator or guardian for the allowance of attorney's fees for services rendered in the matter of the administration of an estate or guardianship, shall set forth the same facts as required by the last preceding rule, and in addition thereto whether or not any agreement, express or implied, has been had touching his compensation, and if so, the

nature and effect thereof. If the petition be for the allowance of fees for recovering damages for wrongful death or injury, or other claim due the estate, the petition shall show the total amount recovered, the nature and extent of the service rendered, and expense incurred by the attorney, and the amount, if any, offered in compromise before the attorney was employed in the matter. In such cases the amount allowed as attorney's fees will be fixed by the Chancellor at such sum as will be reasonable compensation for the service rendered and expense incurred without being bound by any contract made with any unauthorized persons.

RULE 54

Accounts and Petitions Must Be Sworn To. Every account, report, or petition filed by an executor, administrator or guardian shall be personally signed and sworn to by him. And if required by the Court or Chancellor he must produce proof touching the truth of the facts therein stated.

RULE 55

Court Costs Must Be Paid Annually. Every executor, administrator, and guardian shall, prior to filing each annual account pay all court costs accrued to that time and present the clerk's receipted cost bill as a voucher therefor.

RULES CONCERNING VACATION MATTERS

RULE 56

What Part of Record Presented for Vacation Hearing. Where any matter is presented for decree in vacation, whether by counsel in person or by mail, the Chancellor shall be furnished such preceding orders, reports, process, proofs of publication, and other papers as will give him full information in regard to the matter concerning which a decree is desired. And if the matter be the validation of bonds, the confirmation of a sale in vacation, or other matter where any person has a right to protest, then a certificate signed by the Clerk that no protest has been filed must also be furnished.

RULE 57

Return Envelope Must be Enclosed. When any attorney or clerk shall forward papers to the Chancellor in vacation for decree and return, a self-addressed stamped envelope shall be enclosed for the return thereof to the clerk by the Chancellor. If the attorney shall desire a copy of the decree returned to him he shall furnish such copy and self-addressed stamped envelope for the return thereof. All mail sent to the Chancellor should be fully prepaid.

RULE 58

Preliminary Injunction Not Granted Without Notice. No preliminary injunction on *ex parte* application will be granted without a citation upon or notice to the defendant giving a reasonable opportunity to him to be heard in opposition thereto, save only in such cases where it is either wholly impracticable to give such notice, or else the circumstances are so extremely urgent as to permit of no delay.

RULE 59

Removal of Disability. In all cases for the removal of the disability of a resident minor, the minor must be produced before the Court or Chancellor for observation and examination unless specially excused from so doing. Except in extraordinary and exceptional cases the Court or Chancellor will decline to remove the disability of any minor who is under sixteen years of age. In all such cases oral proof or affidavits must be produced.

RULES CONCERNING DUTIES OF THE CLERK

RULE 60

All Papers Filed Must Be Noted on the General Docket. Immediately after filing each paper in any cause or proceeding the Clerk shall make a note or memorandum thereof on the general docket, and shall then place such paper in the jacket or folder containing the papers in that particular case.

RULE 61

All Papers Must Be Kept in Proper Files. The Clerk shall place and keep all papers pertaining to each case in a separate jacket or folder, and all papers pertaining to the same case shall be kept in the same jacket or folder. The Clerk shall place and keep the jackets or folders containing the papers in a filing case in the clerk's office, or vault, in numerical order reckoning from one upward, and not otherwise.

RULE 62

The Clerk Must Safely Keep All Papers. The clerk shall not permit any person, except an attorney interested therein, to take any papers or file of papers, in a pending case, out of his office for any purpose; nor shall be permit any attorney to take the same out of his office unless such attorney shall receipt the clerk therefor in writing on the attorney's receipt docket. When the papers are returned the clerk or deputy receiving them shall sign a like receipt therefor on the attorney's receipt docket. When papers are lost the clerk must show who is responsible. Boyd v. Hawkins, 59 Miss. 325 (1881); Bowman v. McLaughlin, 45 Miss. 461 (1871); Coffin v. Murphy, 62 Miss. 542 (1885); Welch v. Smith, 65 Miss. 394, 4 So. 340 (1888).

RULE 63

Original Wills and Bonds—How Kept. The clerk shall keep all original wills, all bonds and all disputed documents filed with him, safely and securely locked in a safe or vault in his office, and shall not permit the same to be taken from his custody for any purpose, except on an order of the Court or Chancellor entered on the minutes.

RULE 64

Attorneys Must Return Papers Within Fifteen Days. When an attorney shall take the papers in any case out of the clerk's office he shall return them within fifteen days, and in any case before the next term of court. No attorney taking the papers out of the clerk's office may loan them to anyone else and thereby escape responsibility for the safe return thereof.

RULE 65

Clerk Must Bind Vouchers. Whenever the clerk shall file the vouchers to any account of an executor, administrator, or guardian he shall securely fasten them together at the top in numerical order.

RULE 66

When Clerk Shall Require Security for Costs. In all cases where the complainant or petitioner is a non-resident of this state, or is insolvent, the clerk shall, before filing any original bill or petition require the complainant or petitioner to give security for all costs to accrue in the action or suit, or in lieu thereof to pay the fees for filing the bill of petition, docketing the case, and for issuing, executing and returning the process on all defendants thereto. But any citizen of this state who is unable to give security or prepay the costs as above required, may in lieu thereof, make and file an affidavit as provided by Sec. 663 of the Code of 1930. Adopted September 2, 1936, effective January 1, 1937.

II

RULES OF PRACTICE AND PROCEDURE IN MISSISSIPPI CIRCUIT COURTS (1921)

Rule 1

There shall be no disturbance of the court by unnecessary noise or conversation and no disorderly conduct, such as standing along or sitting upon the rail of the bar, or sitting upon or putting feet upon the tables, or smoking while court is in session in the court room, or spitting upon the floor; and there shall be no demonstration of approval or disapproval at any stage of a trial or upon the rendition of the verdict.

Any person offending against this rule shall be fined in a sum not greater than one hundred dollars, and it shall be and is the duty of the sheriff to see to the strict enforcement of this rule, without being specially directed to do so, and a failure on his part will subject him to the penalty above set out.

Rule 2

Any person using any profane or vulgar language or undertaking to tell any indecent anecdote in court during its sessions, shall be fined in the amount as provided in Rule No. 1.

Rule 3

Only officers of the court, attorneys, judges, and ministers of the gospel, members of the press and litigants, or one representative of a litigant, in the case on trial, will be allowed within the rail constituting the bar of the court; and this shall apply to criminal as well as civil cases, but in felony cases the accused and the prosecution may have within the railing one member of the family, or friend to aid in the trial.

It shall be the duty of the sheriff to enforce this rule as required, and under the penalty set out in Rule 1.

Rule 4

The Clerk shall immediately after the opening of court, if practicable, read the minutes of the previous day, and in open court the same shall be corrected if necessary, verified, and signed by the judge.

Rule 5

No person summoned for jury service shall be excused, except as provided by statute, unless it be made to appear that unusual and great injury would be caused by the retention of the particular man.

Rule 6

All jurors, officers of the court, witnesses and attorneys, whose presence is necessary for the trial of the cases set down for that day shall be on hand promptly at the time fixed for the opening of the court, and/or any violation of this rule, where delay is caused, a fine of not more than twenty-five dollars will be enforced against the offending person. International Shoe Company v. Garfinkle, 146 Miss. 799, 112 So. 168 (1927).

Rule 7

It shall be the duty of the clerk, in counties other than the residence of the judge, three weeks before the first day of any term of court, to transmit to the judge thereof, a list of all civil cases that will then be for trial, giving those that will probably be tried, and designate which are cases of original jurisdiction and those brought up on appeal, and any other information as to each case that will aid the judge in properly

setting the docket. The judge shall within a week from the day the list is received set the docket, and all interested persons and attorneys may within the week allowed him for setting the docket, be heard concerning the same, personally or by letter, in the interest of a proper and economical setting of the docket. After the docket has been set, the judge shall prompty mail the list, with the setting of the cases, to the clerk, who shall issue all process accordingly, and also make and mail a copy of such calendar to each lawyer interested, when he knows the residence or postoffice address of such attorney. No change will be made in the dates for which cases are set without the consent of the judge. International Shoe Co. v. Garfinkle, 146 Miss. 799, 112 So. 168 (1927).

RULE 8

Pending criminal cases, where a special venire may be demanded, shall be set for preliminary call on the first day of the term, and subpoenas issued accordingly, unless otherwise ordered.

RULE 9

Cases upon the civil issue docket, where process has been served, that have been called for trial for two terms of Court, without any step taken, or trial demanded, shall be dismissed as stale, at plaintiff's cost, unless good reason be shown for a further continuation; and no cause that has been so dismissed shall be reinstated without affidavit setting forth good reasons for reinstatement.

RULE 10

In all cases the court alone shall examine jurors touching their qualification, and should the juror then appear to be qualified, the court will ask any addiitonal proper question suggested by counsel. Williams v. State, 124 Miss. 720, 87 So. 273 (1920). Rule 10 was avoided by Miss. Laws 1922, c. 294. House v. State, 133 Miss. 675, 98 So. 156 (1923); see also Hewett v. Cobb, 40 Miss. 61 (1866).

RULE 11

Conference with witnesses must be had prior to the commencement of taking the evidence, and will only be allowed afterward as to witnesses inaccessible before that time.

RULE 12

Where the rule is invoked in civil cases, the interested parties, or their representatives excused from the rule, shall either testify before calling their other witnesses, or retire during the examination, as they may elect to do. Wilson v. Peacock, 111 Miss. 116, 71 So. 296 (1916).

RULE 13

Leading questions will not be allowed by the party having the affirmative, except where proper, and specially allowed; nor shall counsel be allowed to ask the witness again a question where there has been a full answer given to the question; but this rule shall not apply rigidly to cross-examination, where more latitude may be required to test the truthfulness, bias, or interest of the witness. And it shall be the duty of the court to enforce this rule of its own motion and without objection being made.

RULE 14

Statements that the overt act will be established shall not justify the admission of threats against the defendant, or the comparative physical condition of the parties, or the character of the deceased or party charged to have been assaulted, but the

hostile demonstration threatening life or great bodily injury may be shown before such evidence will be admitted.

RULE 15

Instructions shall be submitted to opposing counsel, who may suggest their view as to the correctness of the same, before the instructions are passed upon by the court, and the court may require that objections be specifically pointed out to any one or to each instruction asked by the opposite side.

RULE 16

In the argument to the jury counsel will be required to keep within proper bounds, and any attempt to inject improper matter should be stopped by the court without the necessity of objection by counsel; but the court's failure so to do, where there is no objection made, will not constitute a ground for exception.

RULE 17

After the opening argument to the jury, counsel for the opposing side will not be allowed to submit the case and cut off further argument, unless before argument begins they announce that they will not argue the case.

RULE 18

Requests for subpoenas must be made in writing and delivered to the clerk at least one week before the day the case is set for trial, giving location of witness and other information, so as to furnish sure guide to the officer serving the subpoena, which request shall be preserved by the clerk. And service shall be required on a witness but once, but when a case is continued witnesses must be called and notified when to return. International Shoe Co. v. Garfinkle, 146 Miss. 799, 112 So. 168 (1927).

RULE 19

No subpoena instanter shall issue, during the trial of a case, without the consent of the court.

RULE 20

When any original or subsequent pleading is filed, the party filing the same shall leave with the clerk a copy, which on request shall be delivered by the clerk to the opposite party or attorney.

RULE 21

No record, or any part of a file of court papers shall be taken from the clerk's custody, without a written order from the judge to the clerk to that effect; and the clerk, and the person through whose fault a case is delayed by reason of the papers being out of the court room or lost, shall be fined not less than five or more than twenty-five dollars; and where, by permission of the court, papers are allowed to be taken from the clerk's custody, the same shall be redelivered to the clerk on or before the opening of the next term, and any person so failing shall be fined as above provided. Jordan v. Miss. Central Railroad, 107 Miss. 323, 65 So. 276 (1914); Boyd v. Hawkins, 59 Miss. 325 (1881); Welch v. Smith, 65 Miss. 394, 4 So. 340 (1888); Coffin v. Murphy, 62 Miss. 542 (1885); Bowman v. McLaughlin, 45 Miss. 461 (1871).

RULE 22

Motions for security for costs must be made, as far as reasonable, without unnecessary burden to the plaintiff, and to that end shall be filed, and where practicable,

notice given to the opposite party at least three days before the date fixed for trial; and where this is not done, and witnesses are present and cost incurred, the motion will not be entertained.

RULE 23

A verdict will not be set aside as to the damages found and retained as to liability, except where the court is satisfied that the verdict as to liability was rendered upon the merits, and the verdict was not a compromise of the right of the litigants.

RULE 24

Judgments on forfeited recognizances or bonds will not be set aside unless it be made to appear to the court that the default was unavoidable and final judgment will be rendered at the term to which the scire facias is returned executed.

RULE 25

Appeals taken during a term of the circuit court, from an inferior court, are triable at the term then in session.

RULE 26

County attorneys, or conservator of the peace, hearing a commitment case, must see that necessary state witnesses are bound to appear before the next grand jury on its first days session, and that only a sufficient number of witnesses to present the state's case be bound or summoned. The foreman of the grand jury will be instructed to notify witnesses appearing before that body not to leave the court house until excused by the court.

RULE 27

At least two terms of the circuit court at which a grand jury is empaneled, shall be held in each county, and in each circuit court judicial district thereof, every year.

RULE 28

No district attorney, county attorney, attorney at law, county or county district officer, or any other officer of the court shall sign bail or appeal bonds in criminal cases, either from the lower courts to the circuit court, or from the circuit court, to the Supreme Court of the State. It shall be the duty of each circuit judge to so instruct such officers at the time he delivers his charge to the grand jury, and also to instruct all inferior officers not to accept appeal bonds with the names of any such officers signed to them as sureties; and every violation of this rule shall be deemed a contempt of court, and punished accordingly.

RULE 29

Any judge may adopt additional necessary rules, in any county of his district, that are not in conflict with these rules. See International Shoe Co. v. Garfinkle, 146 Miss. 799, 112 So. 168 (1927). See Pickett v. Pickett, 1 How. 267 (Miss. 1836); Lewis v. State, 155 Miss. 810, 125 So. 419 (1930); Y. and M. V. Railroad v. Kirk, 102 Miss. 41, 58 So. 710 (1912), suggestion of error overruled, 102 Miss. 41, 58 So. 834 (1912); Jordan v. Miss. Central Railroad, 107 Miss. 323, 65 So. 276 (1914); Metropolitan Casualty Insurance Co. of N .Y. v. Sullivan, 115 Miss. 399, 75 So. 370 (1917).

III

RULES OF PLEADING, PRACTICE AND PROCEDURE OF THE SUPREME COURT OF MISSISSIPPI

Ordered that the following rules be adopted for the government of this Court, superseding all others heretofore in force and not hereby re-adopted.

Rule 1

Every transcript of record brought to this Court shall be distinctly and plainly printed, or typewritten; and if typewritten, or paper not less than eight, nor more than eight and one-half inches wide and fourteen inches long, on one side of every leaf; and each page shall be numbered at the bottom, at or near the center, and there shall be a blank margin at top not less than one inch, the paper to weigh not less than fourteen pounds to the ream. Transcripts may be typewritten on linen paper, to weigh not less than eight pounds to one thousand sheets, and must be doublespaced.

No carbon or other duplicates, nor transcripts typewritten with copying ink will be received. Each record shall be prefaced by a suitable index and each typewritten transcript shall be securely bound in non-flexible pasteboard covers, with marbled sides, in volumes of about an equal number of pages, not to exceed in any case two hundred and fifty pages in a volume, for the payment of which binding appellant will be allowed sixty cents per volume to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal deposit with the clerk of the court from which the appeal is taken, a binding fee of sixty cents per volume of two hundred and fifty pages.

In such cases the clerk shall transmit the unbound transcript, with the binding fee, to the clerk of this court. Transcripts shall not be folded, but may be rolled for transmission, if not bound as required; and if not bound, the sheets shall not be fastened together.

The clerk of this court shall not accept any record made up in violaiton of these rules, and for the making and filing of such a record no clerk shall be allowed any fees whatever.

Rule 2

Transcript-What to Contain. A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which shall be annexed to the transcript; and exhibits to declarations, bills, answers, depositions, etc., shall immediately follow the particular plea or deposition, first referring to them, and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness, nor certificate of a commissioner to a deposition, nor any proceedings to obtain such a commission, shall be inserted in any transcript except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for anything besides these matters required to be embracd in the transcript.

Mississippi Cent. R. v. Chambers, 103 Miss. 400, 60 So. 562 (1913); United States Fidelity & Guaranty Co. v. White, 106 Miss. 28, 63 So. 329 (1913); Kline v. Sims, 113 So. 190 (Miss. 1927); Yazoo & M.V.R. v. M. Levy & Sons, 147. Miss. 211, 113 So. 325 (1927); Martin v. Broadhead, 202 Miss. 281, 32 So.2d 133 (1937).

See *Mississippi Digest,* App. & E. § § 516-543. (Only cases specifically mentioning the Supreme Court rules are cited.)

RULE 3

Agreed Transcript. By agreement of parties or their attorneys, made in writing, and attested by the Clerk of the Court in which any case may be pending or record existing (which agreement shall be filed and made a part of the transcript of such record), such parts of the record and proceedings as shall be agreed shall constitute the transcript of the record to be brought to this Court; and shall be certified as such and be considered a full transcript in this Court for the consideration and final adjudication of the cause here.

Rowan Miller v. Peeples and Branum, 60 Miss. 45 (1882); Austin v. Von Seutter, 170 Miss. 467, 151 So. 563 (1934).

See, *Mississippi Digest,* App. & E. § § 539, 604.

RULE 4

Suggestion of Diminution of Record. If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the Court may impose, or it may be refused altogether.

Blanks v. Klein, 49 F. 1, 1 C.C.A. 254 (1891); Brown v. Sutton, 158 Miss. 78, 121 So 835 (1931).

See, *Mississippi Digest,* App. & E. § § 643 (4), 659 (1)- 661.

RULE 5

Records and Papers—How Filed. No record or other paper shall be considered as filed until so marked by the Clerk-process of this Court except—and the Clerk shall indorse the date of filing.

RULE 6

Assignment of Errors. (1) On or before the return day the appellant shall file an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed to opposing counsel.

Aetna Ins. Co. v. Robertson, 131 Miss. 343, 95 So. 137 (1923), *cert. denied,* 263 U. S. 698 (1923), *writ of error dismissed,* 263 U. S. 673 (1923); Hattiesburg v. New Orleans & N.E.R., 143 Miss. 587, 108 So. 799 (1926); Nickey v. State, 167 Miss. 650, 147 So 324 (1933), *suggestion of error overruled,* 167 Miss. 650, 146 So. 859 (1933), *aff'd,* 292 U. S. 393 (1934); Crawley v. Ivy, 116 So. 90, 149 Miss. 764 (1928).

See *Mississippi Digest,* App. & E. § § 719-754.

(2) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

Aetna Ins. Co. v. Robertson, 131 Miss. 343, 95 So. 137 (1923), *cert. denied,* 263 U. S. 673 (1923); writ of error dismissed, 263 U. S. 673 (1923); Jones v. Carter, 192 Miss. 603, 7 So.2d 519 (1942); Wright v. Illinois Cent. R., 196 Miss. 150, 16 So.2d 381 (1944); Delta Cotton Oil Co. v. Elliott, 179 Miss. 200, 174 So. 550 (1937).

See *Mississippi Digest,* App. & E. § § 719-754.

(3) The right of an appellant to obtain a review in this Court of any ruling made in the trial Court shall not depend in any wise upon his having filed in such Court a motion for a new trial, or if such motion has been filed upon the grounds thereof being distinctly specified.

RULE 7

Briefs:

(1) Appellant's brief shall be filed no later than twenty-one days before the case is called for argument; appellee's no later than ten days, and any rejoinder brief shall be filed no later than three days before said time . This rule shall not apply where counsel have entered into a written agreement relative to the filings of briefs, but no brief shall be filed after the case has been submitted, except by leave of Court first obtained.

(2) The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court in which there precedes the argument of counsel; first, a concise statement of the case so far as essential to an understanding of the questions presented for determination with specific references to the precise places in the record where the point discussed may be found; and second, a "brief of the argument," which should consist of the points or propositions of law, or fact, to be discussed with the citation of authorities relied upon in their support.

Frederic v. Board of Sup'rs. of Jackson County, 197 Miss. 293, 20 So. 2d 671 (1945).

See, *Mississippi Digest,* App. & E. §§ 755-774

(3) Briefs shall be typewritten or printed; and if typewritten shall be in black, non-copying ink, doublespaced, on white paper, without the name of any person or advertising matter thereon. There shall be appended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel; and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof.

Thomas & Co. v. Wooldridge, 90 U. S. 283 (1874); Grace v. Floyd, 103 Miss. 201, 60 So. 135 (1912); Water Valley v. State, 103 Miss. 314, 60 So. 325 (1913).

See, *Mississippi Digest,* App. & E. §§ 755-774

(4) Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper.

RULE 8

Repealed. See Section 4-Rule 34.

RULE 9

Call and Order of Docket.

Ordered, that rule number 9, adopted October 7, 1912, be and the same is hereby amended so as to read as follows:

(1) Except as may be provided by special order, all civil cases will be called for argument and submission in the order in which they stand on the docket.

(2) On each Wednesday, or prior thereto if the list can then be made up, the clerk shall mail to each lawyer, or firm of lawyers interested therein, a list of the cases to be called during the following week; but the failure of an attorney to receive this list shall not entitle him to have a case in which he is of counsel passed or reinstated after submission.

(3) On the assembling of the court on each Monday, the entire number of cases set for the week will be called, with a view to the disposition of such of them as are not to be argued.

(4) Three weeks before the beginning of the September term and one week before the beginning of the March term, the clerk shall mail to each lawyer or firm of lawyers interested therein, a copy of the docket so far as the same can then be made up.

Ordered, that rule number 8, adopted October 7, 1912, be and the same is hereby repealed.

See, *Mississippi Digest,* App. & E. §§ 808-814.

RULE 10

Argument of Counsel. Only two counsel will be heard for each part on the argument of a case. The time allowed therefor will be determined by the Court in each case, and may be apportioned between the counsel on the same side in their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

John E. Hall Commission Co. v. R. L. Crook & Co., 87 Miss. 445, 40 So. 1106 (1906).

See, *Mississippi Digest,* App. & E. §§ 822-825.

RULE 11

No Reversal for Harmless Error. No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

See, *Mississippi Digest,* App. & E. §§ 1025-1074.

RULE 12

New Trial as to Part. In case a judgment is reversed, and a new trial granted, it shall be only a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

See, *Mississippi Digest,* App. & E. §§ 1178(1)—1178(6).

New Trial as to Damages Only. When a judgment is reversed and a new trial ordered because the damages are excessive or inadequate, and for no other reason, such judgment shall be set aside only in respect of damages and shall stand good in all other respects.

See, *Mississippi Digest,* App. & E. §§ 1178(1)—1178(6).

RULE 14

Suggestion of Error. (1) The losing party may within fifteen days after a judgment is rendered in this Court file a written suggestion of error of law or fact therein, and the Court will take such action thereon as it may deem proper. Upon good cause shown this time may be extended to thirty days; but an application for such an extension must be filed within the original fifteen days.

Hattiesburg v. New Orleans & N. E. R., 143 Miss. 587 (1926); Inman v. Travelers Ins. Co., 154 Miss. 611, 122 So. 537 (1929).

See, *Mississippi Digest,* App. & E. §§ 830-835.

(2) An adjournment of Court less than fifteen days after the rendition of a judgment shall not preclude the filing of a suggestion of error therein, but the same may be filed with the clerk within the time prescribed for presenting such suggestion of error to the Court, whereupon all proceedings on the judgment shall be stayed until it shall be acted upon at the next session of the Court, unless a majority of the judges of the Court shall certify in writing to the clerk prior to the next term that they have considered the suggestion of error and have determined to overrule it; upon receipt of such certificate such proceedings shall be had as if a suggestion of error had not been filed.

(3) No reply to a suggestion of error shall be filed, unless the court, by special rule, otherwise, shall call therefor. But no suggestion of error will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a suggestion of error has been sustained, or overruled, by the Court, no further suggestion of error shall be filed by any party.

Amite Co. v. Mills, 138 Miss. 222, 102 So. 737 (1925).

See, *Mississippi Digest,* App. & E. §§ 830-835.

(4) Any suggestion of error containing language showing disrespect or contempt for this Court will be stricken from the files, and the Court will take such further action relative thereto as it may deem proper.

RULE 15

Papers Out of Office. The person through whose fault a record is not in the court room when the case is called for submission shall be fined the sum of twenty-five dollars.

RULE 16

Motions. Every Saturday shall be motion day; and if counsel be not present, and have no briefs filed when their motions are regularly called, such motions shall be dismissed; and no motion once disposed of, or dismissed, shall again be heard. No motion will be considered, until the opposite party shall have had at least three full days' notice, by mailing, or delivery to such party, a copy of same.

Germain v. Harwell, 108 Miss. 521, 60 So. 212 (1913).

See, *Mississippi Digest,* App. & E. § 818.

RULE 17

Motion to Dismiss—When Waived. When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed for want of prosecution, it shall be considered a waiver of the defect on which the motion was based, unless it be so material that no judgment can be given.

See, *Mississippi Digest,* App. & E. § 797.

RULE 18

Dismissed Cause—How Reinstated. No cause that has been dismissed shall be reinstated without an affidavit setting forth probable error in the proceedings.

RULE 19

Docket—How Called—Delay Cases. At each term of the Court the docket shall be taken up in its order. But on regular motion-day, by motion entered for that purpose, causes may be submitted on a suggestion that they are brought here for delay, and if satisfied of the truth of such suggestion, the Court will take up such causes first, and make proper disposition of them.

RULE 20

Failure to Prosecute—Cause Dismissed. When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

Rodgers v. Bolden, 10 So. 2d 551 (Miss. 1942).

RULE 21

Calculations. When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the Court, in writing and figures, with a certificate by some counsellor not interested in the cause, that the calculation is correct; and no such error will be noticed unless so presented to the Court.

RULE 21-A

When a complaint is made, in a motion to retax the costs incurred in this court, that a fee allowed based on the number of words of an instrument, or transcript thereof, or the transcript of the record as an entirety, is incorrect, the motion shall be accomplished by a written statement of the true number of such words, with a certificate of its correctness by a competent disinterested person; without which no such complaint will be considered.

RULE 22

Agreement of Counsel. No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them.

See, *Mississippi Digest,* App. & E. § 573.

RULE 23

Authority of Counsel—When Required. On motion supported by affidavits, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this Court; and on failing to produce such authority, or furnish such evidence, the appeal may be dismissed.

RULE 24

Criminal Docket—When Called. The Criminal Docket, unless otherwise specially ordered, shall be called on the Fourth Monday of each month of a term, except the month of December, during which month there will be no call of that docket.

Bennett v. State, 99 Miss. 644, So. 482 (1911).

RULE 25

When Appellee May Not Waive Time. After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, not to enter his appearance for trial of the cause at that term.

RULE 26

Attorneys Must Be Admitted to Practice. Attorneys of law who have not been admitted to practice in this Court shall not be permitted to argue orally, or file briefs or any paper in any cause in this Court.

RULE 27

Papers Not Filed After Submission. The Clerk shall not file with the papers of any cause any paper after the cause has been argued, or submitted, except by leave of the Court.

See, *Mississippi Digest,* App. & E. § 609.

RULE 28

Original Papers—When Considered. Whenever it shall, in the opinion of the Judge or Chancellor, be necessary or proper that original papers of any kind should be inspected in the Supreme Court, such Judge or Chancellor may make such rule or order for safekeeping, transporting and return of such original papers as to him may seem proper, and such papers will be considered in connection with the transcript.

Planters' Oil Mill v. Yazoo & M. V. R., 150 Miss. 813, 117 So. 242 (1928); Planters' Oil Mill v. Yazoo & M. V. R., 119 So. 168 (Miss. 1928); Brown v. Sutton, 158 Miss. 78, 121 So. 835 (1929); Austin v. Von Seuter, 170 Miss. 467, 151 So. 563 (1934); Sovereign Camp, W. O. W., v. Duncan, 175 Miss. 724, 165 So. 546 (1936); Spitchley v. Covington, 181 Miss. 678, 177 So. 31 (1937).

See, *Mississippi Digest,* App. & E. § 598.

RULE 29

Costs Paid by Appellant—When Mandate Retained. When costs are awarded in this Court against the appellee, and there shall have been a return of nulla bona to an execution against him, and the costs shall be paid by appellant, no mandate shall issue upon the application of the appellee, until he shall pay into the Court, for the use of appellant, the costs paid by him.

RULE 30

Penalty for Violations of the Rules of This Court. Any litigant, who by himself or his counsel, fails to comply with any of the provisions of the foregoing rules, shall, on motion of the party aggrieved, be taxed with such proportion of the appeal costs as in the judgment of the Court may seem just and proper, in addition to any other penalty which may be provided by the rules.

RULE 31

Remedial Writs. No application for supersedeas, or any other writ or remedial process mentioned in Section 992 of the Code of 1906, (742 Code 1930, 1657 Code 1942) except in cases of greatest emergency, shall ever be acted on, in any case pending in any court, by any member of the Supreme Court, ex parte; but every such application, except in cases of greatest emergency, shall be accompanied by a certificate

of written notice served on the opposite party, or his counsel, or some of them, at least three days before the hearing; and all such applications will be acted upon only when both sides are represented at the hearing, or after such three days notice duly certified as above.

RULE 32

Rules May Be Suspended. These rules shall be considered as general rules for the government of the Court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice.

See, *Mississippi Digest,* Courts § 82.

RULE 33

Felony Cases—Where Appellant is on Bail. After the submission of a felony case in which appellant is on bail, the Court will, by special order, fix the day for the rendition of its judgment. On the day so fixed, appellant must appear before the court to receive judgment, unless he shall have surrendered himself to the Sheriff of the County in which the Court rendered the judgment appealed from was held.

RULE 34

Ordered that the following rule for separating the court into two permanent divisions be and the same is hereby adopted.

Section A. For the convenient dispatch of business the court shall be separated into two divisions of three Judges each—one from each district, designated respectively as Division "A" and "B".

Section B. Each of the Judges shall be assigned to one of the divisions by order entered upon the minutes of the Court when sitting in banc, and shall thereafter, during his term of office remain a member of such division unless transferred to the other by order of the court entered upon the minutes when sitting in banc.

Section C. The chief justice shall be the presiding judge of the division of which he is a member. The presiding justice of the other division shall be the judge thereof who has been for the longest time continuously a member of the Court, and in event no judge of a division has been continuously a member of the Court for a longer time than the others, the Court shall designate by order entered upon the minutes when sitting in banc, which of the said judges shall be the presiding justice thereof. In the absence of the presiding Judge of the division the Judge who has been for the longest time continuously a member of the Court shall be the acting presiding Judge thereof; and in event the two Judges of a division other than the presiding Justice thereof shall have had the same period of continuous service, the court shall designate by order entered upon its minutes when sitting in banc, which of the said Judges shall preside in the absence of the presiding Judge.

Section D. Each division, except when prevented by the sitting of the Court in banc, or when the Court in banc shall otherwise direct, shall sit during alternate weeks; the minutes of a division shall be signed by the Judge thereof then presiding.

Section E. The Court in banc may sit on any day of a term without previous notice being given thereof; but when a case is ordered to be argued before the Court in banc, the clerk, at least one week before the day set for hearing, shall mail a notice to each attorney or firm of attorneys interested therein.

Section F. In event any Judge of either division within fifteen days after a judgment has been rendered, or an order entered by either division, or while a Suggestion of Error therein is pending, shall certify in writing filed with the Clerk that in his opinion such order or judgment is in conflict with prior decision of the court, or of either division thereof, the order or judgment shall be set aside by an order entered on the minutes of the first session thereafter of either the Court in banc or of a division; and the Chief Justice shall cause the full Court, or a quorum thereof, to assemble in conference at a convenient time for the decision of the case; and the judgment agreed on shall be entered at any sitting of the Court in banc.

RULE 35

Return Days:

ORDERED—That the following rule be and the same is hereby adopted: Except as may be otherwise provided by law, the First day of each term and the First Monday of January, May, and July, shall be the return days for all appeals and all process in civil cases.

Ordered and adjudged, Monday, April 24, 1916.

ORDERED that the Clerk of this court shall refuse to receive a record wherein the court reporter's transcript is not indexed as required by Section 721, Code 1930, (1636 Code 1942). When a transcript not so indexed is tendered, the Clerk shall return the same to the clerk of the court below; and at the same time the clerk of this court will notify the attorneys for the appellant, by letter or letters, of his action and the reason therefor.

FOR YOUR BENEFIT

MISSISSIPPI STATE BAR SPONSORS GROUP INSURANCE

In order to fill every member's need for an outstanding Accident and Sickness Insurance Plan, your Group Insurance Committee investigated the idea of group disability insurance during the past year.

HERE'S WHAT WE WANTED

To merit our official endorsement, we felt that any group plan should offer the following advantages:

1—It should have Non-cancellable and Guaranteed Renewable features.

2—It should cover pre-existing conditions.

3—It should offer the broadest coverage available at a substantially lower premium than a similar contract on an individual basis.

4—To be administered in a manner that would relieve you of any clerical details and costs.

5—It should be underwritten by a company of firm financial stability, integrity and experience in the field of insurance for professional men.

HERE'S WHAT WE DID

We found that Continental Casualty Company offered a plan that best fulfilled our needs. This Company has been specializing in group insurance plans for professional men and women for the past 20 years and is now successfully underwriting disability insurance plans for a great many Medical, Dental and Bar associations. Your Group Insurance Committee, therefore enthusiastically approved the idea.

HERE'S WHAT IT OFFERS

$25 to $75 per week indemnity payable up to 5 full years for accidents—2 years for sickness.

$1000 Accidental Death Benefit.

PLUS THESE OUTSTANDING ADVANTAGES:

1—After policy is issued, coverage of the individual member cannot be terminated or restricted to eliminate chronic illnesses so long as the Plan remains in force —until you retire or reach age 70.

2—Pre-existing ailments fully covered.

3—House confinement never required.

4—Uniform premium and coverage to age 70.

5—Dismemberment benefit paid in addition to all other benefits without terminating policy.

6—No reduction of benefits because of other insurance or change of occupation.

7—World-wide coverage.

8—A premium that brings you a saving of 30% to 50% in the cost of your insurance.

PROMPT ACTION NECESSARY

A brochure and descriptive literature giving full details of our Group Insurance Plan together with an enrollment application will be sent to you very soon. Inasmuch as the enrollment period will be limited, it is very important that you cooperate promptly. When you receive the literature—READ IT—STUDY IT—and mail in your enrollment without delay! You wanted good dependable, low-cost, continuous protection. Now your association has made it available. Now let's all get behind this project and put it over in a big way. You probably will not be personally solicited, so it is up to you to show the good judgment and foresight to voluntarily apply. Don't miss the opportunity to be a Charter Member.

SURVEY OF VIOLATIONS OF RULES OF CONDUCT FOR PRACTICE BEFORE THE TREASURY DEPARTMENT—PROJECT OF THE JUNIOR BAR COMMITTEE OF THE SECTION OF TAXATION OF THE AMERICAN BAR ASSOCIATION.

Headlines made by investigating committees of Congress for the past several months have made clear the need for better enforcement of the requirements for practice before the Treasury Department and its various divisions.

The Treasury Department itself has tightened up its methods of checking the qualifications of those enrolled to practice before the Department. It has called in for renewal all Treasury enrollment cards issued prior to January 1, 1952. Treasury field offices have been directed to improve their systems for continuous local check on the qualifications of enrollees. Also, improved methods are being adopted to obtain directly at the Department current reports from bar associations, accounting societies and state authorities regarding cases of disbarments and convictions.

The Junior Bar Committee of the Section of Taxation of the American Bar Association has taken for its project a two-fold task: (1) to publicize those provisions of Treasury Department Circular Number 230 as Revised and the Canons of Ethics of the American Bar Association which are most often violated in this field, and (2) to conduct a survey of the violations.

The Committee feels that in many instances enrollees have overlooked the requirements of the Department Circular and of the Canons of Ethics and have engaged in such improper things as advertising generally tax specialization, splitting fees with accountants, soliciting tax business, engaging in improper tax representation of clients after leaving government service, advertising influence with the Treasury Department, advertising special access to sources of information within the Treasury Department, and generally engaging in improper and disreputable conduct before the Treasury Department.

Honorable A. R. Kehoe, of Seattle, Chairman of the Committee, has asked the writer to arrange for the publication of these provisions and to solicit instances of violations without naming names so that a nation-wide survey can be made which will show which provisions are most often violated and which provisions need greater policing.

Treasury Department Circular 230 sets forth a number of forbidden practices and Section 10.2 (z) of the Circular provides: "It shall be the duty of each enrolled attorney to observe the Canons of Ethics as adopted by the American Bar Association." Those provisions which are most important for the purpose of this project are given below:

Section 10.2(a) (2):

"No further officer, clerk, or employee of the Treasury Department shall act as attorney or agent, or as the employee of an attorney or agent within two years

after the termination of such Treasury employment, in any matter pending in such Department during the period of his employment therein, unless he shall first obtain the written consent thereto of the Secretary of the Treasury or his duly authorized representative.***"

Section 10.2 (s):

"No enrolled person shall attempt to influence the action of any official or employee of the Treasury Department in any Treasury Department matter by the use of threats, false accusations, duress, or by the offer of any special inducements or promise of advantage, or by the bestowing of any gifts or favor or other thing of value."

Section 10.2 (v):

"No enrolled attorney or agent shall in any manner whatsoever solicit, directly or indirectly, or by implication, employment from persons not clients or friends in matters before the Treasury Department or in matters related thereto. Among other things the following shall be deemed to be prohibited by this paragraph.

(1) The publications of articles or the delivery of addresses on Federal tax questions by an enrolled person over the radio or elsewhere in connection with which the name of the firm of which he is a member, associate, or employee, or the address of the writer, or speaker is given either by the writer, speaker, announcer, or publisher, provided that nothing herein shall be construed to prohibit the publication, by periodicals admitted to second-class mailing privileges, of such information concerning contributers of articles as is usually published in such periodicals.

(2) The mailing of circulars, letters, pamphlets or other printed or written matter to persons not clients or friends of such enrolled person which contain no direct solicitation of employment but which do include the name and a description of the practice and address of such enrolled person.

(3) Advertising in one or more of the following forms: (i) Signs, printing, or other advertising matter, indicating previous connection with the Treasury Department; (ii) representation, orally, in writing, or in any other manner, of special influence with the officials or employees of the Treasury Department through acquaintance or otherwise; (iii) the use of any other title or description of the attorney or agent or his practice which tends to suggest some connection with the Treasury Department of the United States, and any title or description containing the word "United States" shall be presumed to carry such suggestion, except there is no objection to the use of the words "Enrolled to practice before the United States Treasury Department;" (iv) distribution of bulletins, circulars, or so-called "tax services," to persons who are not clients or friends of the attorney or agent containing decisions or rulings of the Treasury Department, the Tax Court of the United States, or courts on Federal tax matters, or comment thereon by the attorney or agent; (v) distribution to persons not clients or friends of the practitioner of circulars or pamphlets advertising any business, educational, or social institution, or organization, which circular or pamphlet contains a card of advertisement of the practice of such attorney or agent.

(4) The following kinds of advertising will not be deemed to constitute a violation of this paragraph:

(ii) The distribution by former officers or employees of the Government of cards briefly stating the fact of their former official status and announcing their new association: *Provided,* the cards are addressed only to personal or business acquaintances; *And provided, further,* that such cards are distributed only once and within a reasonable time after severance of official connection with the Government and within 30 days after the formation of a new association."

Section 10.10

Defining forms of disreputable conduct, including the following:

(6) Filing any false or fraudulently altered document or affidavit in any case or other proceeding before the Treasury Department, or procuring the filing thereof, knowing the same to be false or fraudulently altered.

(8) Giving, with intent to deceive, false or misleading information relative to a matter pending before the Treasury Department to any officer or agent of the Department.

(10) Imparting to a client false information relative to the progress of a case or other proceeding before the Treasury Department, knowing the same to be false.

(13) Approving, for filing, a false income tax return prepared by some other person, knowing the same to be false.

(15) Improper retention of a fee for which no services have been rendered.

(17) Obtaining or attempting to obtain money or other thing of value from a claimant by duress or undue influence.

(18) Concealing or attempting to conceal assets in order to evade the payment of Federal taxes.

(19) Representing to a client or prospective client that the attorney or agent can obtain extraordinary favors from the Treasury Department or an officer or employee thereof or has access to unusual sources of information within the Department.

(20) Soliciting or procuring the giving of false testimony in any proceeding before the Committee on Practice or in any other proceeding before the Treasury Department.

As to the Canons of Professional Ethics of the American Bar Association, the following:

Canon 27:

"It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper."

"Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and [may] include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practices; data and place of birth and admission to the bar; schools attended; with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; the fact of listing in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Standing Committee on Law Lists may be treated as evidence that such list is reputable.***"

Canon 34:

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."

Canon 36:

"A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

"A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Canon 46:

"Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that [it] is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper."

Canon 47:

"No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the authorized practice of law by any lay agency, personal or corporate."

Any member of the bar desiring to bring to the attention of the Committee any matter for the purpose of inclusion in the above-mentioned survey should furnish the data to the undersigned member of the Committee without mentioning the names of the individuals involved.

Marvin A. Cohen
Deposit Guaranty Bank Building
Jackson, Mississippi

NOTES

THE WORK FOR THE MISSISSIPPI SUPREME COURT FOR THE 1950-1951 TERM

*T. E. Douglas**
and
*George Gleason***

INTRODUCTION

This is not an attempt to review generally the work of the Mississippi Supreme Court. Instead, it is a review of the work of the Court for the term, 1950-1951.

The Supreme Court is to be commended on its remarkable achievements in the 1950-51 session. It handed down decisions on more than 400 cases and out of the 400 cases decided, only a negligible number of *Per Curiam* decisions were rendered. When compared with the number of such decisions reported by other State Supreme Courts and the United States Supreme Court, this is an admirable accomplishment.

The members of the Court have worked hard and conscientiously and have come as near to the mythical goal of justice as is humanly possible. They are to be congratulated for a job well done.

This review does not synthesize or discuss all 400 of the cases above-mentioned. Since many of the cases are mere restatements of the law, the authors have tried to select the most representative of them for treatment here.

I

CONTRACTS

Consideration

The Supreme Court of Mississippi seems to adopt the rule as expressed in Section 90 of the Restatement of Contracts which is to the effect that a promise which the promisor should reasonably expect to induce action or forbearance of a definite or substantial character on the part of the promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by the enforcement of the promise. It is enough to say that a promise need not have the support of what is referred to as consideration in order to be enforceable.

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Performance

Our court holds that substantial performance of contracts, of certain types, will support a recovery on a quantum meruit basis, if not on the contract itself. For example, in *Darby Lumber Co. v. Hill*[1] it was decided that the stacking of lumber in eight foot stacks by the plaintiff, instead of in six foot stacks as provided in the written contract between the plaintiff and defendant, showed a substantial performance, and damages for nonpayment of the agreed price in the contract were allowed.

Liability

It was held in *Collins v. Crout*[2] that where the trustees of a public school operate a trade school as individuals, they may be sued for debts which they incur in connection with such trade school.

With reference to representations made by one of the parties to a contract: If the seller of a store and its stock and fixtures states to the probable purchaser that he has an option on the location of the business for another year and then another option to renew for two more years, this is considered as a material factor in inducing the buyer to purchase, and, when such a statement is made in fraud, the resulting contract may be set aside because of this fraud. Such was held in *Dodson v. McElreath.*[3]

By the same token, further avoidance of liability is possible by a proper plea of the Statute of Frauds. In *Poole v. Johns-Mansville Products Corporation*[4] the plaintiff and defendant entered into an oral contract for the cutting and hauling of wood with a guarantee to the plaintiff of employment thereunder for a period of not less than two years. It was held that such a contract could not be performed within the space of 15 months, and therefore an action could not be brought to charge the defendant thereon. However, as in *Carrilon v. Thornton,*[5] where a seller of goods sues for the unpaid portion of the purchase price, the defense that the goods were resold to the seller in cancellation of the indebtedness, without any transfer of possession, will not be upheld as being outside the Statute of Frauds on the basis of an entry on the books of the buyer.

Liens

Where one party agrees to loan another party money to furnish a crop, the lender is entitled to a Landlord's Lien on the crops so raised by the borrower on the lender's land. It was so held in *Ware v. Martin.*[6] It is also well to mention that although this contract was signed on Sunday,

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[1]209 Miss. 816, 48 So.2d 484 (1950).
[2]51 So.2d 278 (Miss. 1951).
[3]210 Miss. 160, 48 So.2d 861 (1950).
[4]210 Miss. 528, 49 So.2d 891 (1951).
[5]211 Miss. 507, 52 So.2d 9 (1951).
[6]210 Miss. 500, 49 So.2d 832 (1951).

still it was held valid since it was shown that the prior discussions and the final agreement by the parties to the contract were made on week-days.

As concerns conditional sale agreements, *Garrett v. Hunter*[7] involved the selling of an automobile by the plaintiff to a used car dealer with a conditional sales contract. The plaintiff was paid by check. The defendant bought the same auto from the dealer, and the plaintiff brought replevin. It was held that the rule giving the defendants no better title than the conditional vendee had is not always applicable. If the plaintiff knew that the vendee intended to resell the auto, as here, the defendants may have a better title to it. The check given the plaintiff was invalid, but the plaintiff was held to be estopped to claim title as against the defendants since he knew that the vendee intended to resell the auto.

Sales

In the case of *Watts v. Adair*[8] this Court was concerned with the sale of a defective refrigerator to the plaintiff by the defendant. In a subsequent action by the purchaser, in which he alleged the existence of a warranty on the machine by the vendor, the court concluded that ". . . there is in this state no implied warranty of fitness or quality of articles where there has been an executed sale by one not a manufacturer" where such person has not assumed the obligation of the manufacturer.

Accord and Satisfaction

Brumfield v. Kenna[9] involved an action to clarify the terms of an alleged employment contract and compel payment of a stipulated salary. It was held that since evidence on appeal showed that the sued for amount had been paid to the plaintiff and he had signed a disclaimer of any further demand against the defendants, in the absence of any demand for reimbursement for refund, the complete accord and satisfaction between the parties rendered the issues moot and the appeal was dismissed.

II

COMMERCIAL LAW

AGENCY

Generally

In accordance with the usual rule, it was held in *Petermann v. Gary*[10] that when an employer lets an employee, who he knows is a habitual drunkard, use a truck owned by the employer, the employer is liable for injuries sustained by the plaintiff due to the drunken condition of the employee.

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[7] 48 So.2d 871 (Miss. 1950).
[8] 211 Miss. 777, 52 So.2d 649 (1951).
[9] 209 Miss. 731, 48 So.2d 357 (1950).
[10] 210 Miss. 438, 49 So.2d 828 (1951).

Similarly, in *Richton Tie and Timber Co. v. Smith*[11] the appellant sold a truck to one Johnson, who was known in the community as a drunken driver, under an agreement whereby Johnson was to use the truck for the sole purpose of delivering timber to the appellant. Under these facts the appellant was held liable for the damage done to the plaintiff's building by Johnson while driving in a drunken condition.

Delegation of Liability

If a master is under a duty to furnish his servant with a truck in a safe condition, he cannot delegate such a duty to a repair shop. Therefore, where the servant notified the master of a defective condition in the truck he was driving, the master did not relieve himself of liability by sending the servant to a repair shop with the truck; but rather, the negligence of the repair shop in repairing the truck was imputed to the master, and the servant could recover from the master for injuries caused by such negligence.[12]

Notice

Under the Business Sign statute the property of one individual may be held although it belongs to another if the individual having it in his possession does not openly give notice of the true owner or make it known that he is merely an agent or a partner of the other. In *National Cash Register Co. v. Thompson*[13] a cash register was sold to one Simmons under a conditional sales contract which was recorded in the deed of trust records of the county. Two others attached the property of Simmons and the cash register was sold along with the other property of Simmons. It was said that since the conditional sales contract was duly recorded, the attaching creditors of Simmons had notice of the contract and the Business Sign statute was inapplicable. Therefore, title to the cash register was held to be in the vendor.

Termination of Relationship

Where an employer tells his employee to leave a tractor and trailer at a certain place and not to drive it at night because it has no lights, but the employee drives it anyway, using it to pick up his personal belongings, the master-servant relationship has terminated and the employer is not liable for injuries to a third party caused by the employee.[14]

CORPORATIONS

Authority

It was held in *Burnett's Lumber and Supply Co. v. Commercial Credit Corp.*[15] that a corporation, organized to do a general wholesale and retail

[11]210 Miss. 148, 48 So.2d 618 (1950).
[12]Edman v. Kochtitzhy, 211 Miss. 301, 51 So. 2d 482 (1951).
[13]210 Miss. 37, 48 So.2d 608 (1950).
[14]Simmons v. James, 210 Miss. 515, 49 So.2d 839 (1951).
[15]211 Miss. 53, 51 So.2d 54 (1951).

lumber and building material business, had the authority to sell certain motor vehicles and assign to plaintiff with recourse the conditional sales contracts and notes taken on the vehicles and also to assign to plaintiff renewal contracts and notes with recourse.

Dissolution

In a suit for dissolution by a minority stockholder, the Court held the evidence to be insufficient to show mismanagement or a trend toward insolvency, and that the suit should therefore be dismissed without prejudice to plaintiff's right to recover in another suit any compensation wrongfully paid to the directors.[16]

Doing Business

A case which seems to conflict somewhat with *Lee v. Memphis Publishing Co.*[17] is the case of *Davis-Wood Lumber Co. v. Ladner.*[18] The facts in this case were that plaintiff and defendant entered into a contract whereby plaintiff was to cut and saw timber for defendant, using defendant's mill and trucks. Under the contract as carried out, the defendant's president remained on the site of the sawmill operations in Mississippi and had his trucks pick up the lumber sawed by plaintiff and transport it to Louisiana. The defendant at the time of the suit was not doing business in Mississippi. It was held that the defendant was doing business in Mississippi within the meaning of Sections 1437-1440 of the Mississippi Code of 1942. The Court stated that whether a corporation is doing business within the meaning of this statute is a question primarily dependent upon the facts of each case and that ". . . we hold that where the action arises out of the activities of the non-resident in the state, Sections 1437 *et seq.* are applicable."

CREDIT TRANSACTIONS

Appointment of Successor Trustee

The case of *Enochs v. Mississippi Tower Building, Inc.*,[19] among other problems, involved the question of the legality of the appointment of a successor trustee under a bond mortgage. The bond mortgage contained a provision that ". . . a successor may be appointed by the holder or holders of not less than a majority in amount of all notes hereby secured and then outstanding by an instrument . . . of such holders of such notes and properly executed and recorded in the State of Mississippi." In a liquidation proceeding in Louisiana a successor trustee was appointed by the liquidator and others with the approval of the Louisiana Court. Complainants contended that this appointment was not legally made and that foreclosure sale

[16]Hudson v. Belzoni Equipment Co., 211 Miss. 178, 51 So.2d 223 (1951).
[17]195 Miss. 264, 14 So.2d 351 (1943).
[18]210 Miss. 863, 50 So.2d 615 (1951); see also 23 Miss. L. J. 67 (1951).
[19]210 Miss. 676, 50 So.2d 551 (1951).

made by such trustee was therefore invalid. The Mississippi Supreme Court, however, held that all the conditions of the bond mortgage were complied with and that the foreclosure sale was valid.

CREDITORS' RIGHTS

Priority of Liens

A judgment creditor acquires no prior rights to the proceeds of a sale under an attachment proceeding by another creditor where such judgment is rendered subsequent to the levying of the attachment.[20]

Garnishment

Where a garnishee, in response to interrogatories propounded by the plaintiff, asserts that the answering of such interrogatories would put an undue burden upon it, such an answer should not be stricken by the trial court. The garnishee has the right to raise the legal question as long as its position is reasonable. Therefore, the trial court should give the garnishee a hearing and if it finds the questions should be answered by the garnishee, the garnishee should be given ample time to answer.[21]

III

CRIMINAL LAW

Homicide

In *Lackey v. State*[22] the conviction of the defendant, who was charged with causing the death of a woman by the attempted performance of an abortion on her, was reversed by the court as not being murder within the meaning of Section 2215(b) of Code of 1942. Such was held because the "universal malice" statute "does not apply to cases of death produced by acts eminently dangerous to or directed specifically against the person killed." It was not shown that the defendant in this instance had a deliberate design to effect the death of the deceased and the acts done did not imperil indiscriminantly the lives of others.

In *Watts v. State,*[23] wherein the defendant claimed that his acts were not the cause of the death of the deceased, the conviction of manslaughter was affirmed and testimony of one not an expert or a physician was admissible to show the jury that the deceased, who had lived for forty-eight days after the action, had died of a bullet wound caused by the defendant. "Cor-

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[20]Merchants Grocery Co. v. Gulley Grocery Co., 210 Miss. 33, 48 So.2d 606 (1950).
[21]Keathley v. Hencock, 53 So.2d 29 (Miss. 1951).
[22]211 Miss. 892, 53 So.2d 25 (1951).
[23]210 Miss. 236, 49 So.2d 240 (1950).

pus Delicti" was held to consist of (1) the fact of death and (2) the criminal agency existing as the cause of death.

The defendant in *Morgan v. State*[24] appealed from his conviction of manslaughter. He had shot the deceased, a stranger, while he was attempting to break into his place of business in a drunken condition after being warned several times by the defendant to go away. A knife was found in the deceased's open hand but the defendant did not know of this until he had killed the deceased. The conviction was reversed on appeal to this court as the circumstantial evidence of the state had failed to exclude every reasonable hypothesis other than that the defendant acted in his necessary self-defense.

In *Goff v. State*[25] a prosecution for murder, the defendant argued that he was the only one who actually saw the shooting of the deceased and that the shooting was in self-defense. The court, however, allowed this question of self-defense to go to the jury and also admitted testimony of the brothers of the deceased to the effect that they heard from a distance the rifle shot of the appellant first and then the shotgun blast by the deceased and then another rifle shot by the appellant, which would show that the appellant was actually the aggressor.

Perjury

The defendant in *Tribble v. State*[26] made an affidavit stating that he saw one Agee shoot another. At the trial of Agee for murder, defendant denied that he knew who had fired the shot. These contradictory statements of the defendant were the only evidence against him in a perjury charge upon which he was convicted. Upon appeal, the conviction was reversed on insufficient evidence. The Court did indicate, however, that if only one witness to the falsity of defendant's statement had been produced, the conviction would have been upheld.

Confessions

In dealing with the admissibility of confessions, the Court in *Stone v. State*[27] held that the trial court is not bound to determine, prior to admitting a confession in evidence, whether the confession was voluntary or not unless the defendant asks that such investigation be made. Also decided in that case was that, although it is a general rule that evidence of a separate crime from the one which the defendant is charged is not to be admitted, it is permissible to admit such evidence if it is so connected with the crime with which the defendant is charged as to add a link of motive or premeditation

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[24] 50 So.2d. 375 (Miss. 1951).
[25] 49 So.2d 238 (Miss. 1950).
[26] 210 Miss. 606, 50 So.2d 149 (1951).
[27] 210 Miss. 218, 49 So.2d 263 (1950).

necessary in proving the crime being considered on trial. In the *Stone Case* the court allowed evidence that the defendant had stolen the gun, which he used in killing the deceased some days later, to show that the necessary criminal intent and premeditation were present.

In *Winston v. State*[28] defendants were contesting admissibility of confessions, in a robbery conviction because the confessions were made before any preliminary hearing was had, such hearing being required by Mississippi law. The opinion stated that although a prompt preliminary hearing is endorsed by this court, failure to give such a hearing does not make prior confessions to the charge inadmissible where made without threats, violence, hope of reward or other inducements.

It was further held in *Jones v. State*[29] that a confession made by the defendant, while he was intoxicated, due to inducements made by third parties who are private persons and who have interfered without any kind of authority, is not to be excluded from evidence.

A confession made by the defendant, while he was being illegally detained in jail and not charged with any specific crime was in *Roberts v. State*,[30] held to be admissible. The Supreme Court held that evidence aliunde the confession need not show the crime beyond a reasonable doubt but need only show it by a preponderance of the evidence in order for the confession to be admissible.

Upon a preliminary examination outside the presence of the jury to determine whether or not an alleged confession was voluntarily made, all the witnesses present when the alleged confession was made should have been heard; and further, the state should have offered testimony in rebuttal to defendant's testimony of his brutal mistreatment. *Holmes v. State*[31]

An admission by the appellant, in *Benson v. State*[32] to the effect that he had struck the deceased because deceased cursed him was held admissible although the sheriff did not tell or warn the defendant that his statement would be used against him, since the statement was obtained without use of force, threat, duress or promise of reward.

Evidence and Witnesses

The shotgun allegedly used by the defendant in killing the deceased and also a picture of the surroundings at the scene of the killing are both properly admissible in evidence, according to *Sims v. State*,[33] to show any

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[28]209 Miss. 799, 48 So.2d 513 (1950).
[29]209 Miss. 896, 48 So.2d 591 (1950).
[30]210 Miss. 777, 50 So.2d 356 (1951).
[31]211 Miss. 436, 51 So.2d 755 (1951).
[32]48 So.2d 119 (Miss. 1950).
[33]209 Miss. 545, 47 So.2d 849 (1950).

malice or intent and to show whether the defendant was the aggressor or not. Also, in *Hancock v. State*[34] photos of the body of a child allegedly killed by her father were admitted to show extent of mistreatment, and are not inadmissible on ground of being used to incite the jury against the defendant. Testimony in that same trial by the mother of the defendant that she never saw the defendant mistreat the child was held inadmissible because such a question was too general to be considered.

In a murder prosecution, to allow a witness to testify that he changed his story from version that the deceased fell off the truck and was run over to the version that the defendant had struck deceased with a lumber binder because some boys had told the witness that others said they were going to get the defendant out of trouble and that the witness better not testify against him, was prejudicial to the defendant and held wholly inadmissible in *Simmons v. State*[35]

Where a witness at the time of the crime accuses the defendant within the hearing of the defendant, such statements are admissible in evidence if the defendant does not immediately deny the accusation, according to *Thurmond v. State.*[36] Actually such statements are not hearsay, since their truth or falsity is not in issue although they are in the nature of a confession implied from the defendant's silence. The Mississippi Supreme Court chooses to call such statements an "exception" to the hearsay rule. In *Redding v. State,*[37] this court ruled that although an exception to the hearsay rule permits witnesses to testify that the prosecutrix in a rape case told them she had been raped, in order to show that the prosecutrix made an immediate complaint, such witnesses may not testify to the details of the alleged rape as related to them by the prosecutrix.

In *Whitt v. State*[38] this court held that evidence offered must embody a fact substantive in its nature and relevant to the issue made in the case. In so holding, they exclude testimony of a witness of the defendant that the father of the murdered child had told the witness that he did not know who shot him, after the father had previously testified that the accomplice of the defendant shot him in the back. Ostensibly the witness' testimony was introduced to attack the credibility of the father but was ruled out as being irrelevant.

The defendant is under a duty to use diligence in obtaining appearance of an absent witness, and on his motion for a new trial must present witnesses to the court, or, if that is not practicable, he must secure their ex parte affidavits. It was so held in *Bolin v. State.*[39]

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[34]209 Miss. 523, 47 So.2d 833 (1950).
[35]48 So.2d 601 (Miss. 1950).
[36]53 So.2d 44 (Miss. 1951).
[37]211 Miss. 855, 53 So.2d 7 (1951).
[38]210 Miss. 817, 50 So.2d 385 (1951).
[39]209 Miss. 866, 48 So.2d 581 (1950).

The supreme court in *Boone v. State*[40] reaffirmed the well settled rule that the presumption of the legitimacy of a child born in wedlock is not a conclusive presumption. A defendant who was charged criminally with failing to support his minor child, therefore, should have been allowed to introduce evidence of non-access to the mother during the conception period.

Illegal Search and Seizure

Upon appeal by a defendant convicted of the possession of intoxicating liquor, it was held in *Little v. State*[41] that when the affidavit for the search warrant, in describing a particular room, used the phrase "to the left" while the writ used the phrase "on the left" the description is substantially identical and sufficient to affirm the conviction. The court had also rejected the instructions to the jury dealing with the issue of legality of the search as this is concluded to be a matter of law.

If one atacks an officer of the law while he is making an illegal search of his premises, he may not be convicted for resisting arrest or for assault and battery with intent to kill. This is graphically illustrated by two recent decisions, *Hartfield v. State*[42] and *Pettis v. State*.[43] In the *Hartfield Decision* the sheriff, without a warrant, entered the backyard of defendant's premises and it was shown that the officer did not smell whiskey until he did so enter the yard. He attempted to arrest the defendant, and she fought him. Since the Sheriff was held a trespasser, she was immune from conviction as her actions "were reasonable." Similarly, in the *Pettis Case* the action of the lower court in overruling the defendant's motion for a peremptory instruction was held error on appeal.

Miles v. State[44] upheld an indictment charging the defendant with the unlawful possession of intoxicating liquor and, in general, stands for the proposition that defendant could not object to the lack of or a defective search warrant when the arresting officers did not go upon the premises belonging to the defendant.

Objection by the defendants, charged with cattle rustling, to the admission of evidence of what the sheriff saw was held properly overruled in *Huggins v. State*.[45] This is not within the meaning of illegal search and seizure. Justice Alexander, in the course of the opinion, stated that "even as a roving eye may commit no trespass, so must we refrain from identifying a mere prodding by inquiry into an unlawful search".

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[40]211 Miss. 318, 51 So.2d 473 (1951).
[41]50 So.2d 390 (Miss. 1951).
[42]209 Miss. 787, 48 So.2d 507 (1950).
[43]209 Miss. 726, 48 So.2d 355 (1950).
[44]51 So.2d 214 (Miss. 1951).
[45]209 Miss. 552, 47 So.2d 852 (1950).

Larceny

In *Williams v. State*[46] this court reaffirms that it is larceny to obtain, fraudulently, property of another with intent to deprive the owner of the property. Necessary elements of an attempt to commit larcency are the intent to commit and the overt act towards its commission. Whenever the design to commit a crime is clearly shown, then slight acts in furtherance of this design will constitute an attempt. The facts of the *Williams Case,* held here to be sufficient to warrant a conviction of an attempted larceny, are practically identical with the facts of the previous "Pidgeon Dropping" cases before this court, of which this is another.

It is larceny rather than embezzlement when the defendant takes more cigarettes from a storeroom than authorized to take since the taking is without the consent of the owner. *Jackson v. State.*[47]

Trial and Appeal

On the trial of *Murray v. State*[48] the District Attorney in his argument to the jury referred to the criminal record of the defendant, when the defendant had not placed his character in issue. This was held to be grounds for a mistrial, notwithstanding the fact that the defense attorney had argued that so far as the proof was concerned, there was nothing against the defendant's character or reputation as to previous violation of the law.

Although the defendant in a criminal action waives his right to trial by jury at one term of court, at which time the case is not tried, he is entitled to a jury trial at a subsequent term of court if he demands it, as was enunciated in *Newton v. State.*[49]

It was held in *Clanton v. State*[50] that the defendant's rights were not prejudiced by the court when he was ordered by the judge to be seized and held for action by the grand jury on a charge of perjury unless the defendant can properly show that members of the grand jury were in the courtroom at the time and, if present, that they were influenced by such action.

Where the defendant was apprehended on July 16, indicted for murder on August 22, and on August 23, with his counsel present, pleaded not guilty, and the trial was started on August 29 and was concluded on August 31, and every witness who knew anything was within 15 miles of the courthouse and all the defendant's witnesses were present, then overruling a motion for continuance on grounds that there was a lack of time

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[46]209 Miss. 902, 48 So.2d 598 (1950).
[47]211 Miss. 828, 52 So.2d 914 (1951).
[48]52 So.2d 288 (Miss. 1951).
[49]211 Miss. 644, 52 So.2d 488 (1951).
[50]210 Miss. 700, 50 So.2d 567 (1951).

in preparing the case was not an abuse of discretion. Also, an instruction for manslaughter is not to be given unless there is some competent evidence tending to show that the killing was in the heat of passion and without malice. Such were the facts and opinion in *Newell v. State*.[51] Similarly, in *Pass v. State*,[52] a motion for a continuance was properly disallowed when it was shown that the absent witness for the defendant was not at the shooting and that the defendant's counsel's statements did not show witness' condition for absence, and no evidence of the reason for not obtaining an affidavit showing what the testimony of the witness would have been was offered.

In *Street v. State*[53] the defendant was convicted of child desertion. Upon appeal, it was shown that he was without counsel in the lower court and that the state had failed to show venue or prove same on trial. This question was first raised on appeal. The conviction was reversed when the Supreme Court could not find in the record where venue was proven since in criminal cases, proof of venue is jurisdictional and the failure to make such proof may be raised for the first time on appeal.

As regards cases in which a plea of insanity is made by the defendant, it was held in *Williams v. State*[54] that when such a plea is sustained, and the defendant is sentenced to an insane asylum, and later released as cured, and then subsequently retried on the original offense, the plea of res adjudicata may be properly overruled and the issues of the defendant's sanity at the time of the subsequent trial and his sanity at the time of the commission of the offense may be submitted to the jury for determination, without prejudicing the defendant.

Indictments

The indictment for illegal sale of beer in *May v. State*[55] failed to state that as a result of an election duly and lawfully held for such purpose, beer was not permitted to be sold in the county in which the sale occurred. Therefore, the indictment on the face showed no valid cause of action and the conviction was reversed, without prejudice, to be brought later on a correct indictment.

If the defect in the indictment goes to the essence of the crime, then it may be raised for the first time upon appeal. Such was the defect in *Love v. State*,[56] which involved a charge of indecent assault upon a female

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[50a] Since preparation of this article, this case has been reversed by U. S. Supreme Court. 72 Sup. Ct. 424 (1952).

[51] 209 Miss. 653, 48 So.2d 332 (1950).

[52] 209 Miss. 744, 48 So.2d 362 (1950).

[53] 209 Miss. 735, 48 So.2d 358 (1950).

[54] 49 So.2d 261 (Miss. 1950).

[55] 209 Miss. 579, 47 So.2d 887 (1950).

[56] 211 Miss. 606, 52 So.2d 470 (1951).

under the age of thirteen but failed to allege that the defendant was above the age of eighteen years.

The supreme court showed itself firm on the rule that no conviction can be predicated on statements made before the grand jury in connection with a separate offense. In *State v. Milam*[57] there was a prosecution by the state against the Milam brothers for assault and battery. The defendants made a motion to quash the indictment on the ground that the indictment was based on statements made before the grand jury. The motion was sustained and affirmed by this court on appeal by the state. Although the facts show that the defendants were brought before the grand jury on their own accord and told by the District Attorney that they were not to give any testimony concerning the assault and battery that they were later charged with and the defendants signed a waiver and said that they wished to tell all they knew, still this court feels that average citizens, as these were, without counsel and with a natural feeling that if they refused to tell about the assault and battery, which in this instance was closely related to the burglary charge which they were there to relate, then they were inferring they were guilty, that this would come within the meaning of an involuntary confession or involuntary testimony and therefore fall within the constitutional privilege against self-incrimination. Upon suggestion of error,[58] the court said that although the indictment was quashed still this does not mean that these defendants would be immune from prosecution under an indictment by some other grand jury.

Instructions

An instruction that the jury was required to presume that the defendant was innocent from the very beginning of the trial until the case was closed was properly refused to the defendant in *Wright v. State*.[59] Also in that same trial the supreme court affirmed the overruling of a requested instruction by the defendant to the effect that if the jury believe that the chief witness of the state was unable, due to intoxication at the time of the homicide, to understand and realize what was happening they might disregard such testimony. The court stated that such was argumentative and singled out for emphasis parts of the testimony.

As concerns instructions defining the offense charged, the opinion of *McGee v. State*[60] reiterated the rule that instructions defining manslaughter are not erroneous in omitting accidental killing as an excuse if the defendant obtained instructions relating to the same offense. It is quite proper for the state's attorney to instruct the jury that the defendants reputation for peace or violence was not in issue if the defendant's counsel has previously

[57]210 Miss. 13, 48 So.2d 594 (1950).
[58]210 Miss. 13, 49 So.2d 806 (1951).
[59]209 Miss. 795, 48 So.2d 509 (1950).
[60]50 So.2d 394 (Miss. 1951).

mentioned the failure of the state to bring in proof of the defendant's bad reputation when the state had not chosen to raise the issue. To be included in this line of cases is that of *Knot v. State*[61] in which an instruction defining an assault with intent to kill was not held reversible error because it failed to include the element of intent. The instructions allowed the defendant in this same instance informed the jury of this necessary element for conviction.

Giving additional instructions to the jury, when requested, is not reversible error. It was further mentioned by the court in their opinion of *Wages v. State*[62] that it is not a prerequisite that the identity of the principal to be known in order to convict the accessory, and that when the corpus delicti is shown, if the jury believes that the defendant is guilty of abetting the crime, or is an accessory to such crime, then he is guilty as charged.

It is not reversible error for the trial court to refuse to grant instructions beginning ". . . if you believe the defendant," according to *Hatcher v. State*.[63] It is proper that such instructions start ". . . if you believe from the evidence the defendant" etc. This is to insure that the verdict is on the evidence and not on the whims or wishes of the jury.

In *Parnell v. State*,[64] the appellant was convicted of murder and appealed because of the trial court's refusal to allow him an instruction for the jury to consider the testimony of two of the state's witnesses carefully "taking under consideration their bias, prejudice and interest in the case, if any." The conviction was affirmed and the supreme court held this refusal not reversible error since the requested instruction assumed evidence of bias, prejudice and interest on the part of the witnesses when there was no evidence of this before the jury. Similarly, in *State v. Jennings*[65] several of the deceased's neighbors who were with him on the night he was killed by the defendant testified for the state. The defendant was granted the following instruction: "The Court instructs the jury for the defendant that in considering the testimony of . . . (the deceased's neighbors) you should weigh that testimony carefully, taking under consideration their bias, prejudice and interest in the case, if any." The defendant was acquitted and the state instituted an appeal to settle the point of law. It was held by the supreme court that this instrucion was improper, but it was indicated in the opinion that if the witnesses had been co-conspirators of the deceased or accomplices, then the instruction would have been proper.

It was held in *Character v. State*[66] that when a judge told a deadlocked jury that he "would see them in the morning," but did not tell them where

[61] 209 Miss. 756, 48 So.2d 367 (1950).
[62] 49 So.2d 246 (Miss. 1950).
[63] 210 Miss. 661, 50 So.2d 387 (1951).
[64] 211 Miss. 100, 50 So.2d 925 (1951).
[65] 50 So.2d 352 (Miss. 1951).
[66] 53 So.2d 241 (Miss. 1951).

he was going, and then the jury asked for an additional 5 or 10 minutes at which time they returned with a verdict of manslaughter within 15 minutes, the jury was not thereby coerced into returning a verdict.

Intoxicating Liquor

The supreme court advocates a strict compliance by the county with the provisions of the statute establishing procedure outlawing the sale of wine and beer according to *State v. Hoyle.*[67] In that instance, it was held proper to exclude evidence of an order of the board of supervisors based on an election to outlaw the sale of wine and beer when it was shown by the defendant that there were only 26 days between the first publication of notice of an election and the day of election. Such time was held to be insufficient notice.

Under Section 2646, Code of 1942, which provides for injunctive relief against the keeping of liquor on the premises, the indictment must give the names of the true owners of the premises and ascertain the true owners in the trial court, and an injunction directed to the "owners and operators of premises" is to unascertained and unknown persons and so broad, indefinite and uncertain as to be unenforceable, as was ruled in *Vermillian v. State.*[68]

In instances in which whiskey is found either some distance from the house of the appellant, as in *Foster v. State,*[69] or where it is found on the premises of the appellant but in a room rented to a tenant, as in *Hansbrough v. State,*[70] it is too indefinite to charge the appellant with its possession, and such evidence is insufficient to warrant a conviction.

In one trial, *Dossett v. State,*[71] the defendant argued that the police power to regulate the possession of intoxicating liquor was now exclusively in the United Nations. The court, of course, found the argument to be without merit.

In *Bradley v. State*[72] the sheriff went to the home of the defendant with a valid search warrant and, without finding the defendant at home at the time, executed the search and found whiskey. Later that night, the sheriff noticed a truck being driven by the defendant. He followed it and when it was stopped at the home of the defendant, the officer smelled liquor in the back of the truck, searched the truck and found it. This search was held to be legal and the evidence obtained by such admissible.

The "beaten path doctrine" is well illustrated by *Revette v. State.*[73] The liquor which the defendant was charged with possessing was found

[67] 211 Miss. 342, 51 So.2d 730 (1951).
[68] 210 Miss. 255, 49 So.2d 401 (1950).
[69] 49 So.2d 258 (Miss. 1950).
[70] 209 Miss. 625, 48 So.2d 120 (1950).
[71] 211 Miss. 650, 52 So.2d 490 (1951).
[72] 209 Miss. 750, 48 So.2d 365 (1950).
[73] 209 Miss. 860, 48 So.2d 511 (1950).

along a well-beaten path which led from the realty of the defendant through a pasture and continued onto property of another. Ten empty kegs were also found in a tool house on the appellant's property. The path was well traveled by others. This court on appeal reversed the conviction holding that the "beaten path doctrine" applies only where the whiskey is found at or near the termination of the path and where there is a limited access by others to the premises where the liquor is found. This decision is in accord with the prior decision of *Walker v. State*[74] and *Sellers v. City of Picayune*.[75]

Procedure

In *Miles v. Monaghan*[76] the appellant's suspended sentence pronounced three years previously for the unlawful possession of intoxicating liquor was revoked upon his being convicted of the same offense later. His motion to withdraw his former plea of guilty to the prior offense was overruled. The court in their opinion indicated that in order to withdraw a plea of guilty previously entered there must be (1) a showing of innocence of the charge, (2) a contention that the appellant had been misled, and (3) the application to withdraw must be made within a reasonable time. The trial judge's discretion had not been abused in this case. The court further stated that the trial court had not lost its jurisdiction by the lapse of three years, citing *Crump v. Trapp, Sheriff*.[77]

Venue, like any other fact in a criminal case, may be proved by either direct or circumsatntial evidence. Therefore, where a sheriff and others testify, as in *Cruthirds v. State*,[78] that they are officers "here" in a certain county and that they found an illegal liquor still "here," venue is adequately proven.

A *writ of corum nobis* was held not to lie where there was no showing that perjured testimony had knowingly been used by the prosecuting officers in convicting the defendant. It was further stated that the supreme court has no power to enlarge upon the functions, powers and jurisdiction of the county courts. *Robertson v. Quave*.[79]

The refusal of an instruction that public drunkenness cannot be committed in a private home was held proper in *Hall v. State*.[80]

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[74]199 Miss. 289, 24 So.2d 751 (1946).
[75]202 Miss. 741, 32 So.2d 450 (1946).
[76]211 Miss. 150, 51 So.2d 212 (1951).
[77]36 So.2d 459 (Miss. 1948).
[78]51 So.2d 747 (Miss. 1951).
[79]211 Miss. 398, 51 So.2d 777 (1951).
[80]211 Miss. 90, 50 So.2d 924 (1951).

IV

DOMESTIC RELATIONS

Adoption

In *Eggleston v. Landrum*[81] the chancellor found the petitioners in an adoption proceeding:

> "are fit, suitable and proper persons to be the adopted parents of said minor, except that they are believers in the doctrine and teachings of the Church of Christ Scientists, and the court finds that by reason of their belief in such faith, and solely for that reason, they are not proper persons to be the adopted parents of said minor and that, therefore, the petition should be denied."

In reversing the case and decreeing the adoption prayed for, the Supreme Court found that the child had suffered no ill effects from the fact that the petitioners had taken care of the child and that they had given him all the necessary medical attention, such as small pox vaccinations, etc., and that although the petitioners were believers in the Christian Scientist faith, they were not members and had no objection to medical treatment.

Marriage

There is a strong presumption in favor of the validity of a ceremonial marriage as against a prior common law marriage[82] Although common law marriages are recognized in Mississippi, where the complainant has had the same relationship with the half-brother of a deceased person, she cannot recover as the widow of such deceased person, especially in view of the fact that the chancellor found the complainant incompetent to claim a share of the deceased's estate as a widow.[83]

Divorce and Alimony

Although in a case where a blind man brings an action of divorce against his wife, a lesser degree of misconduct would be required to establish cruel and inhuman treatment, yet where the evidence is conflicting the decree of the chancellor dismissing the bill will not be reversed.[84]

In *Dickerson v. Horn*[85] the chancellor found the appellant wilfully and contumaciously failed to comply with the terms of the divorce decree directing the payments of alimony and directed that he be committed to jail until the arrears should be paid. The Supreme Court held that it was "error to

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[81]210 Miss. 645, 50 So.2d 364 (1951).
[82]United States Fidelity and Guaranty Co. v. Smith, 211 Miss. 573, 52 So.2d 351 (1951).
[83]Butler's Estate v. McQuarters, 210 Miss. 86, 48 So.2d 617 (1951).
[84]Gray v. Gray, 48 So.2d 518 (Miss. 1950).
[85]210 Miss. 655. 50 So.2d 368 (1951).

commit appellant to jail until he shall have paid the arrears of the allowances. . ."

In *Chrismond v. Chrismond*[86] it was held that ". . . a woman who has entered into an arrangement with a man whereby she has lived in his home, cared for him and kept house for him, worked and assisted him in the accumulation of property, and has subsequently married him in good faith, when in fact he was incapable of contracting a legal marriage with her because of his prior marriage to another woman, and who thereafter has continued to work and assist him in his business, is entitled to an equitable division of the property accumulated by their joint efforts during the time they were living together."

The denial of temporary alimony without a finding of fact but "as a matter of law" is error.[87]

However, the rule was reaffirmed in *Pickering v. Pickering*[88] that the award and the amount of alimony are matters peculiarly in the discretion of the chancellor and his decision will not be disturbed unless manifestly wrong. In this case it was also stated that under the particular circumstances the wife was not entitled to an allowance for counsel fees on her unsuccessful appeal.

Res Judicata

Ethridge v. Webb[89] involved a question of title to property. In 1945 complainant's wife was awarded separate maintenance and adjudged to be the owner of the property. Complainant alleged in the present suit that a subsequent conveyance of the property by the wife was invalid for the reason that his money was used to purchase the property and that he had not abandoned it as his homestead. In affirming the decision that the conveyance was valid, the Court held that the chancellor properly excluded evidence that the wife ousted complaint from the home prior to 1945 because the 1945 decree was res judicata on this point.

Lynch v. Lynch[90] involved the additional question of the validity of a foreign divorce decree. Defendant had lived most of his life in Oxford, Mississippi, but in June, 1945, had obtained employment in Arkansas. About two and a half months later he filed suit against his wife, the present complainant, and obtained a final decree in the latter part of November. Two weeks later he returned to Oxford. The residence requirements for obtaining a divorce in Arkansas are: "A residence in the State for three months next before the final judgment granting a divorce in the action and

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[86]211 Miss. 746, 52 So.2d 624 (1951).
[87]Neely v. Neely, 52 So.2d 501 (Miss. 1951).
[88]51 So.2d 740 (Miss. 1951).
[89]210 Miss. 729, 50 So.2d 603 (1951).
[90]210 Miss. 810, 50 So.2d 378 (1951).

a residence for two months next before the commencement of the action." The chancellor, following this statute, ruled that the defendant had obtained a valid divorce and sustained his plea of res judicata. The Supreme Court in reversing the chancellor's ruling found that he had interpreted the Arkansas Statute too literally since the Arkansas cases follow the case of *Williams v. North Carolina*.[91] Since the defendant at the time he obtained his divorce decree in Arkansas had no bona fide intent to establish a domicile *animo manendi* in Arkansas, the Arkansas decree was held not to be entitled to full faith and credit by the Mississippi Courts. However, in connection with the question of the power of Mississippi Courts to disregard foreign divorces, it should be noted that our chancery courts cannot entertain a bill to have a foreign divorce declared void on the ground of its having been fraudulently obtained. To declare the foreign divorce void under such conditions would in effect be an advisory opinion and would not actually void the divorce.[92]

V

EVIDENCE[93]

Dying Declarations

Although a dying man says nothing respecting his anticipation of death, his declarations may be admissible as dying declarations by virtue of the fact that his awareness of impending death is implied from the nature of his wound or the state of his illness.[94]

Hearsay

Of course, where the truth or falsity of a statement is not in issue, it is admissible (if material) because it is not hearsay.[95]

Opinion

It is correct for a trial court to exclude the opinion of a highway patrolman, deduced from photographs made at the scene of an automobile collision, as to whether or not one of the vehicles was running at an angle at the time of the collision since the jury is as well qualified to pass on the matter as the witness.[96]

Photographs

Where witnesses who were not present when a certain photograph of the scene of a collision was made testified that it was fairly representative of

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[91]325 U.S. 226 (1944).
[92]Cliburn v. Cliburn, 209 Miss. 631, 48 So.2d 126 (1950).
[93]See also Criminal Law, Evidence, *Supra*.
[94]Fulton v. State, 209 Miss. 565, 47 So.2d 883 (1950).
[95]Handshoe v. Daly, 211 Miss. 189, 51 So.2d 230 (1951).
[96]Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So.2d 443 (1951).

what they saw soon after the accident, the photograph was properly admitted in evidence although the photographer did not testify as to its having been properly made.[97] However, in a suit where the defendant allegedly diverted a water course from its natural course, the failure of the chancellor to admit aerial photographs of the surrounding terrain was held to be not reversible error because the long briefs and testimony gave an adequate picture without such photographs.[98]

Survivorship

In the case of *Daniels v. Bush*[99] the children of Mrs. Bush by a former marriage brought suit against the children of Mr. Bush, alleging that Mrs. Bush survived Mr. Bush in an automobile accident and that they were therefore entitled to share in the estate of Mr. Bush. The chancellor found that the proof failed to show that Mr. Bush died before Mrs. Bush and that "The presumption is that they died at the same time." In affirming the judgment the court stated that there is no presumption of survivorship in our state; neither is there a presumption or assumption of simultaneous death. Since the preponderance of the evidence established the fact that Mr. Bush survived his wife and since there was no adjudication in regard to the chancellor's erronous "presumption" the right result was reached and the chancellor's announcement was harmless error.

Witnesses

Where the proposed testimony of a juror is "merely cumulative" the refusal to allow such a juror to testify is not reversible error regardless of the reasons for such refusal assigned by the trial judge.[1]

VI

INSURANCE

Coverage

In *American Life Insurance v. Byrd*[2] the group insurance policy contained a provision that the insured, in order to obtain the benefits due to total disability, must stipulate that he required the attendance of a registered physician at least once a week. In spite of the plaintiff's failure to comply with this provision the court quite properly held that he was entitled to a peremptory instruction when he was found to be totally disabled. Similarly, *in Lipnick v. New York Life Ins. Co.*[3] it was held that an instruction for the defendant defining "total disability" in the same terms used in de-

[97]Patton v. Nelson, 51 So.2d 752 (Miss. 1951).
[98]Buchanan v. Hurdle, 209 Miss. 722, 48 So.2d 354 (1950).
[99]211 Miss. 1, 50 So.2d 563 (1951).
[1]Lucus v. State, 211 Miss. 339, 51 So.2d 583 (1951).
[2]210 Miss. 50, 48 So.2d 614 (1950).
[3]211 Miss. 833, 52 So.2d 916 (1951).

fining it in the insurance policy sued upon was erroneous as not correctly stating the law and that the error was not cured by conflicting instructions given the plaintiff.

On the other hand, the provisions of an insurance policy will be construed strictly against the insurer. Where there was a provision in a policy that "theft includes larceny, burglary, and robbery. Mysterious disappearance of any insured property shall be presumed to be due to theft." Where the stone was lost from a ring on which the holdings were thin with wear, it was held to be a jury question as to whether the stone had been stolen or not, in view of the fact that the insured's maid had left and was never seen again. The Court stated that the presumption of theft is one that remained, since the defendant had put it into his contract.[4]

But the failure of the plaintiff to give notice of loss, in accordance with the provisions of a blanket fidelity position bond does not prejudice the defendant's rights as insurer and the plaintiff is entitled to recover. It would place an undue burden on the plaintiff to require him to comply strictly with the fifteen-day notice provision since proof of loss may not be available until long after an employee has been suspected of stealing.[5]

In *State Farm Mutual Auto Ins. Co. v. McKay*[6] the appellee was a car dealer who had the car in question insured by appellant. The car was sold on the installment plan to one Breland but Breland defaulted in his payments. It was agreed that appellee would place the car on his lot for sale and that he would take the balance owed by Breland from the proceeds of the sale, giving the remainder to Breland. However, before a sale was made the car was loaned to a customer who was having his own automobile repaired. While in the possession of the customer, the automobile was damaged. The Court held that the appellee's rights under the policy were not terminated by the loan.

In *American Life Insurance Co. v. Barnett*[7] an insurance agent told the insured that a new medical expense policy would "take the place of the other policy" discontinued by the insurance company. However, the new policy contained a "joker" providing that "tuberculosis, heart disease, hernia or any sickness which results in a surgical operation, shall be covered only if the cause thereof originates after this policy has been in force for ninety days or more from the date of issue of this policy." Between the dates approximately forty and sixty days distant from the effective date of the "new" policy the insured was treated for a ruptured appendix. Approxi-

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[4]Caldwell v. St. Paul Mercury and Indemnity Co., 210 Miss. 320, 49 So.2d 570 (1950).

[5]Hartford Accident and Indemnity Co. v. Hattiseburg Hardware Stores, Inc., 49 So.2d 813 (Miss. 1951).

[6]209 Miss. 706, 48 So.2d 349 (1950).

[7]51 So.2d 227 (Miss. 1951).

mately 140 days from the effective date of the policy the insured was operated on for the removal of her appendix. The Court held that the ninety-day provision was applicable and was not waived by certain letters or representations of the insurance company or its agents. Ostensibly it would seem that there is something amiss in either our insurance legislation or its application when the uninformed pay for insurance coverage which they do not have for a period of three months.

A general agent may of course waive any of the provisions of a policy and the question of whether or not the insured notified the agent of certain material facts is a question for a jury to decide.[8]

Reformation

Just as an agent may waive a provision as if he is the insurer, his error, though made in good faith, cannot be used to avail the insurer. This was brought out in *Lititz Mut. Ins. Co. v. Miller*.[9] The facts there were that one Miller, a carpenter, secured a loan from the bank with a deed of trust on a house he was constructing. In the deed of trust Miller agreed to insure the house with the loss payable to the bank as its interest appeared. Upon being contacted by the local agent of the defendant insurance company, Miller stated that the house was mortgaged to the bank. However, the agent failed to insert in the policy issued a mortgage clause in favor of the bank. Upon receiving the policy, Miller immediately turned it over to the bank. Seven months after the loss, Miller filed suit for the proceeds of the policy. The bank intervened, upon motion of the defendant, and petitioned the court to transfer the case to chancery court and for a reformation of the instrument. It was held that instrument should be reformed and judgment given for Miller subject to the paramount claim of the bank. In addition to the bank being entitled to a judgment on the ground of reformation it was said to have an equitable lien on the proceeds of the policy.

Right to Proceeds

Where the beneficiary of an insurance policy is beaten by the insured, runs safely from the house, procures a gun and returns to fatally injure the insured by shooting him from outside the house, such a beneficiary is an aggressor guilty of wilfully causing the death of the insured and is therefore not entitled to the proceeds.[10]

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[8]Buffalo Ins. Co. of New York v. Borden, 211 Miss. 47, 50 So.2d 895 (1951).
[9]210 Miss. 548, 50 So.2d 221 (1951).
[10]Gholson v. Smith, 210 Miss. 28, 48 So.2d 603 (1950).

VII

TRIAL AND PROCEDURE

Action and Remedy

Open Account. In an action on open account if the defendant does not appear and file an affidavit that the plaintiff's account is incorrect, he has waived his right to raise an objection that the account is not properly itemized.[11]

Replevin. In an action of replevin to get possession of certain insurance policies it was held that the court did not have jurisdiction of the res since the writ did not follow up with the seizure of the policies prior to trial. It was also said in this case that the defendant could assert an equitable lien on the policies upon a transfer of the cause to Chancery or by an independent bill in Equity.[12]

Mandamus. In *Darby, Chancery Clerk v. Hunt*[13] mandamus was held to be the proper remedy for the purchaser of land at a tax sale when the chancery clerk refused to give him a deed to the land because of the failure of the sheriff to give the clerk a list of the property sold at the tax sale.

Contempt of Court. Although it is of course quite proper for a citizen to settle a civil action out of court, he may not attempt to obtain money in settlement of a taxpayer's suit to recover the penalty for unlawful sale of intoxicating liquor unless he has the delegated authority to so settle the case. In such circumstances the citizen will be held guilty of contempt of court although the contempt occurred outside the presence of the court.[14]

Appeals

If an appellant is not diligent in prosecuting his appeal, his appeal may be dismissed by the Supreme Court. This is illustrated by the case of *Cobb v. Frazier*[15] in which there were four return days between the time the appeal bond was approved and the hearing in which the appeal was dismissed. However, it would seem that the Court gives an appellant every reasonable opportunity to perfect his appeal. In *American Creosote Works, Inc. v. Rose Brothers, Inc.*,[16] it was stated by way of dicta that although an appellant must notify the court reporter within ten days after adjournment of the term of court, a motion by the appellee to strike the stenographer's notes will be insufficient where it is based solely upon a letter from the

[11]Britton v. Magnolia State Casket and Supply Co., 210 Miss. 264, 49 So.2d 404 (1950).
[12]Van Norman v. Van Norman, 210 Miss. 105, 48 So.2d 633 (1950).
[13]209 Miss. 738, 48 So.2d 359 (1950).
[14]Melvin v. State, 210 Miss. 132, 48 So.2d 856 (1950).
[15]209 Miss. 603, 48 So.2d 124 (1950).
[16]211 Miss. 173, 51 So. 2d 220 (1950).

court reporter to the circuit clerk stating that the notice was a day late. This "ex parte and hearsay statement is insufficient to justify the striking of the evidence in this record."

The Supreme Court has no jurisdiction to review an order of the circuit court granting a new trial, since such an order is not final as required by the applicable statute.[17]

In a case in which the trial court has overruled objections to the validation of consolidated school district bonds, the appellee is entitled to a preference on appeal and, upon his motion, such a case will be advanced on the docket of the Supreme Court.[18]

The recital of a verdict in the judgment is binding on the appellate court and such court will not on a motion for certiorari consider another verdict written on a separate piece of paper where such other verdict is not a part of the record and is not proven in the trial court.[19]

Attorneys

Where an attorney enters into a contingent fee arrangement with an heir to represent the heir in contesting a will and the heir executes a deed to the devisees of any interest he might have in the property, the attorney does not have such a vested interest in the property in question or the cause of action as will permit him to intervene in the suit to contest the will. Neither is the conveyance by the heir to the devisees a fraudulent conveyance as to the attorney because the attorney is not a creditor of the heir, but at most only a contingent creditor. However, the dismissal of the bill of intervention does not affect the attorney's possible right to bring any action he might have against the heir. (An interesting issue, which was of course not settled, contained in this case is question of the constitutionality of the statutory provision permitting only Syrian or Lebanese aliens to inherit property.)[20]

Jurisdiction

The rule was laid down in *Burns v. Godwin*[21] that where an automobile collision occurred in a neighboring state which has a nonresident motorist statute similar to Mississippi's and one of the parties sues his claim arising out of such collision to judgment in that state, such state had jurisdiction despite the fact that all the parties were residents of Mississippi and, therefore, such judgment may be sued upon in Mississippi.

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[17]Street v. Lakey, 209 Miss. 412, 47 So.2d 816 (1950).
[18]Robertson v. Board of Sup'rs of Winston County, 211 Miss. 800, 51 So.2d 741 (1951).
[19]Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So.2d 443 (1951).
[20]Pollard v. Joseph, 210 Miss. 828, 50 So.2d 546 (1951).
[21]211 Miss. 310, 51 So.2d 486 (1951).

In *Schrader v. Texas Co.*,[22] it was held that in a proceeding to sell infants' mineral interests the chancery court had jurisdiction where the adult defendants answered the day after the petition was filed despite the fact that such adult defendants had not been served with summons.

Notice and Hearing

The Court construed the statute[23] giving the Circuit Court the power to remove deputy sheriffs from office "whenever in its opinion the public interest will be subserved thereby" as requiring (1) a cause for removal, and (2) notice to such persons of the charges and an opportunity to disprove them.[24] There is quite a contrast between this case and the case of *City of Meridian v. Davidson*[25] in which the irrelevant issue of the right of trial by jury was so laboriously considered.

In proceedings for the creation of a drainage district, signers of the petition who subsequently withdrew their names from the petition were held to have until midnight of the day set in the clerk's published notice to withdraw their withdrawal from the original petition, since the hearing had not been completed.[26]

Failure to give notice of the appointment of a guardian to a non compos mentis does not render such appointment void.

Res Judicata

If a former case involving the same issues, subject matter, and parties or their privies determines the boundary line between two sections of land it is res judicata in a subsequent action to determine the boundary line to defendant's property.[27] Similarly, if the plaintiff splits his cause of action he is barred from bringing a subsequent suit on the other component part to recover the statutory penalty for the wrongful cutting of timber and for damage to realty.[28]

In *Kimbrough v. Wright*[29] the plaintiff sued on a judgment rendered against the defendant when defendant was non compos mentis. In a suit in chancery subsequent to the rendering of the judgment the defendant had not been allowed to attack certain transactions between plaintiff and defendant's guardian. In the present suit just as he had done in the former suit the defendant seeks to attack the validity of the judgment rendered against him on the ground that the appointment of the guardian was void.

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[22]211 Miss. 214, 51 So.2d 460 (1951).
[23]Miss. Code § 4235 (1942).
[24]*In re* Bishop, 211 Miss. 518, 52 So.2d 18 (1951).
[25]211 Miss. 683, 53 So.2d 48 (1951).
[26]Allison v. Camp Creek Drainage District, 211 Miss. 354, 51 So.2d 743 (1951).
[27]Yazoo County v. Falkner, 209 Miss. 641, 48 So.2d 137 (1950); *See also* Moses v. Weaver, 210 Miss. 228, 49 So.2d 235 (1950).
[28]Duett v. Pine Mfg. Co., 209 Miss. 830, 48 So.2d 490 (1950).
[29]211 Miss. 63, 50 So.2d 909 (1951).

It was held that the former suit was res judicata on the point of whether or not the appointment of the guardian was valid.

Statute of Limitations

The question of whether the statute of limitations of Mississippi or the statute of limitations of another state controls is undoubtedly a material factor in a case brought on an oral contract. The Supreme Court in *Edmondson v. Edmondson*[30] held that the trial court erred in overruling a motion of the defendant to require the plaintiff to disclose whether the oral contract sued upon was consummated in Alabama or Mississippi.

The Court held in *Sullivan v. Nobles*[31] that since a guardian of a non compos mentis who sells the ward's land and who uses the money thereby acquired to purchase other land is acting in the latter transaction under "an implied, resulting or constructive trust and not an express trust," another guardian of the ward is barred after thirty-one years by the statute of limitations,[32] from cancelling the deeds wherein the first guardian sold the land so purchased.

It was stated in *Mitchell v. Town of Magee*[33] that a suit upon bonds issued by the defendant town was barred by the six year statute of limitations and that "Mere mistake, accident or ignorance of one not under disability is not sufficient to suspend its operation."

The statute of limitations may be pleaded in Chancery Court under certain circumstances.[34]

VIII

PUBLIC LAW

Administrative Law

In *City of Meridian v. Davidson*[35] it was held that a jury in the circuit court could not "intelligently determine when a civil service commission of a municipality has acted in 'good faith for cause' in discharging a member of its fire department, where the jury does not have before it the same evidence on which the commission acted, but hears additional testimony on the same issues of fact passed on by the commission." Therefore the Court reversed and remanded the case for the retaking of testimony before the civil service commission and the filing of a transcript of the record of the testimony in the circuit court on the rehearing of an appeal. Justices Lee

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[30]209 Miss. 596, 47 So.2d 121 (1951).
[31]211 Miss. 330, 51 So.2d 736 (1951).
[32]Miss. Code § 746 (1942).
[33]51 So.2d 198 (Miss. 1951).
[34]Davis v. Davis, 210 Miss. 182, 49 So.2d 242 (1950).
[35]211 Miss. 683, 53 So.2d 48 (1951).

and Hall dissented upon the ground that the fireman was being denied his right to a trial by jury.

In affirming the action of the circuit court in reversing the finding of the Workman's Compensation Commission in *Lucedale Veneer Co. v. Rogers*[36] the court indicated that the construction to be placed upon the applicable statute should be liberal. It was said in that case that if as a result of sudden effort there is a severe pain in the hernial region incapacitating a worker, and if a doctor is called within forty-eight hours, the hernia is compensable. A worker may be forced to cease work "immediately" within the meaning of the statute if he stopped work with a reasonable time after the occurrence of his injury.

In two cases decided during the term of court under consideration the Mississippi Supreme Court reversed the decision of the Mississippi Public Service Commission in granting bus companies certificates of public convenience and necessity.[37] It was said that where the area in question is already being served by one bus company a duplicate certificate should not be granted, and even if the existing service is inadequate, the existing carrier must be given an opportunity to furnish the required additional service. On the surface, these cases would seem to be indicative of a substitution of judicial intuition for administrative knowledge.

Counties

A county has the right to issue an order for the widening of a road and to take the land necessary for such widening, although the road has been taken over for maintenance by the State Highway Department by order of the State Highway Commission if the Commission's order is not to be effective until the road has been widened. The damages awarded for the taking of the land by the county are computed according to the value of the land at the present time; special damage which might occur in the future cannot be considered.[38]

A county may be liable on a contract or for work done. In *Moorhead Drainage District v. Pedigo*[39] it was held that a surveyor could recover for engineering surveys made in preparation for a reclamation project. The power to contract in such a case is implied. Also, in *Shook v. Carroll County*[40] an administrator was allowed to recover for the work done by his decedent in repairing the road machinery of a supervisor's district.

The county authorities have the power to lease school lands for a cer-

[36]211 Miss. 613, 48 So.2d 148 (1950).
[37]Southern Bus Lines, Inc. v. Mississippi Public Service Commission, 210 Miss. 608, 50 So.2d 149 (1951); Dixie Greyhound Lines, Inc. v. American Bus Lines, Inc., 209 Miss. 874, 48 So.2d 584 (1950).
[38]McRaney v. Covington County, 210 Miss. 192, 49 So.2d 248 (1950).
[39]210 Miss. 284, 49 So.2d 378 (1950).
[40]210 Miss. 537, 49 So.2d 897 (1951).

tain amount of cloth to be paid annually and upon default of payment the rent may be collected in the money value of the cotton.[41]

In *Tucker v. Daniels*[42] the complainants as taxpayers, property owners, and qualified electors challenged the validity of an order by the county school board abolishing common school districts and altering consolidated school districts. It was held that complainants had no right to bring the suit since their only injury, according to the bill, was that of taxpayers. It was said that the rights asserted in the bill were public in nature but that the complainants did not sue on behalf of others similarly situated and to allow such suits would result in multiple litigaiton and a hampering of official bodies in their duties.

State v. Hoyle[43] held that the board of supervisors of a county allowing the sale of beer could not zone the county so as to prohibit the sale of beer within a radius of ten miles of any church or school where the result would be to prohibit all sales of beer within the county.

Municipalities

In reversing the case of *Brummett v. City of Jackson*[44] the Court held that a municipality had the power to operate an airport, that such operation was a corporate and not a governmental function, and that neither an ordinance passed nor a notice posted at the airport constructively became a part of the contract sued upon unless the plaintiff had actual knowledge of such ordinance and notice.

The rule laid down in *Mayor and Board of Aldermen of City of Natchez v. Engle*[45] is that a municipality has

> "no power to enter into a contract of any kind for the payment of an underwriter's fee or commission to investment bankers for an underwriter's guarantee of the sale of municipal bonds, or for the purpose of procuring a purchaser for such bonds prior to the advertisement for and receipt of bids, as provided for in the 1946 act, or to enter into a pre-election conditional sales contract for the sale of such bonds." Neither can the municipality "delegate to a group of investment bankers the power and authority to procure for the municipality the necessary legal and engineering services which may be required to enable the municipality to issue and sell its revenue bonds and to construct the public utility improvements contemplated" in the contract involved in the case.

Zoning ordinances are generally upheld when shown to be related to the general welfare of the municipality. For instance, it was held that a

[41]Gerry v. Superintendent of Education, 211 Miss. 462, 52 So.2d 13 (1951).
[42]50 So.2d 896 (Miss. 1951).
[43]211 Miss. 342, 51 So.2d 730 (1951).
[44]211 Miss. 380, 51 So.2d 564 (1951).
[45]211 Miss. 380, 51 So.2d 564 (1951).

zoning ordinance which prohibited the reconstruction of a non-conforming building when it had been more than fifty per cent destroyed by casualty was quite proper.[46] However, the state statute authorizing the zoning of municipalities must be strictly complied with. In *Brooks v. City of Jackson*[47] a bill seeking to enjoin the enforcement of a re-zoning ordinance was good on demurrer because the published notice of the public hearing to be held by the city failed to show what city was to hear the request to rezone and the place where the hearing was to be held.

Miscellaneous

The fact that a hospital has outstanding stock does not prevent it from qualifying for a grant-in-aid as a non-profit corporation under section 5310 of the Mississippi Code of 1942.[48]

The surety on the official bond of a notary public is liable for the damage resulting from the notary's making of a false certificate, and it is unnecessary that the injured party rely on such certificate in order to make the surety liable.[49]

IX

TAXATION

In *Stone v. Memphis Steam Laundry Cleaner*[50] it was held that drivers of out of state laundry trucks are transient vendors and that the privilege tax imposed upon them does not violate the interstate commerce clause of the Federal Constitution.[50a]

In an action to collect privilege taxes imposed on a lending agency charging more than fifteen per cent interest, the trial court is authorized to look through the forms with the agency's transactions take and base its decision upon the real facts.[51] This case was distinguished from the case of *Tower Underwriters Inc. v. Lott*[52] in which the plaintiff was not allowed to recover the total amount of principal and interest under the usury statute since the amount charged for the loan was considered to be a brokerage fee.

For the purposes of the state unemployment taxes, hotel which contracts with an orchestra leader for the services of an orchestra is not the employer of the members of the orchestra notwithstanding the fact that the contract refers to the hotel as the employer. The orchestra leader is an independent contractor and the employer of the members of the orchestra.[53]

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[46]Palozzola v. City of Gulfport, 211 Miss. 737, 52 So.2d 611 (1951).
[47]211 Miss. 246, 51 So.2d 274 (1951).
[48]Craig, State Auditor v. Mercy Hospital—Street Memorial, 209 Miss. 427, 47 So.2d 867 (1950).
[49]U.S. Fidelity and Guaranty Co. v. Ward, 211 Miss 864, 53 So.2d 11 (1951).
[50]53 So.2d 89 (Miss. 1951).
[51]Alt v. Bailey, 211 Miss. 547, 52 So.2d 283 (1951).
[52]210 Miss. 389, 49 So.2d 704 (1951).
[53]Mississippi Employment Sec. Commission v. Heidelburg Hotel Co., 211 Miss. 104, 51 So.2d 47 (1951).

It was held in *Stone v. W. G. Nelson Exploration Co.*[54] "that where a driller in good faith acquires a lease as owner in whole or in part and drills a test well for oil thereon and receives contributions from others in the area to indemnify him against loss, under the facts and circumstances of the instant case, the driller is not liable for the tax[55] on the contributions so received."

The statute allowing recovery of a $500 tax by the state and county for the unlawful sale of intoxicating liquor creates a civil, not a criminal, proceeding, and the taxpayer is not entitled to a jury trial in the chancery court.[56]

X

REAL PROPERTY

Adverse Possession

In order for one to establish title by adverse possession, the claimant must show by competent evidence the particular area used, cultivated or occupied in such a manner that the court can locate and describe such area in its decree.[57]

Although the continued possession of land by a grantor is presumed to be in subordination to the grantee's title, where the grantor by simple deed conveys to another and by mistake continues in hostile, actual, open and notorious possession of the land, his title is perfected by the passage of ten years despite the fact that the grantee's successor in title notifies the grantor during the ten year period that she has no objection to his continuing to use and occupy the land. *Batson v. Smith.*[58]

Hurst v. J. M. Griffin & Sons, Inc.[59] involved a suit to remove cloud. The land was owned by tenants in common. One of these tenants conveyed by quitclaim deed his undivided interest. It was assumed erroneously that by such the grantee of the tenant-in-common received the entire ownership because he thought wrongly that all of claimant's contenants were dead. The supreme court held that this error in thinking did not fill the statutory requirements of title by adverse possession, particularly as between tenants-in-common and that the quitclaim deed was not an unconditional assertion of entire ownership of the property as would impart constructive notice to cotenants.

The complainant in *Lott v. Sebern*[60] bought the land adjoining the de-

[54]211 Miss. 199, 51 So.2d 279 (1951).
[55]Imposed by Miss. Code § 10110 (1942).
[56]Bishop v. Bailey, 209 Miss. 892, 48 So.2d 588 (1950).
[57]Parks v. Simmons, 52 So.2d 14 (Miss. 1951).
[58]211 Miss. 428, 51 So.2d 749 (1951).
[59]209 Miss. 381. 47 So.2d 811 (1950).
[60]210 Miss. 99. 48 So.2d 626 (1950).

fendant's land with full knowledge that the defendant was over the line established by deed. They later discussed the deeds, and even told one another that they would someday go into court to decide who really owned it. This, however, says the court does not estop the defendant from pleading the statute of adverse possession in an action to quiet title and these verbal statements by the defendant are not sufficient to stop the adverse possession.

Since "estoppel is affirmative matter and he who asserts it has the burden to establish the facts necessary to constitute it", it was held in *Brown v. Pittman*[61] that in order for a claimant to land to be estopped from basing his claim on adverse possession the person pleading permissive use must identify and locate the particular area alleged to be held under permissive use.

It is also well to note that in establishing adverse possession it is not necessary to show residence on or cultivation of the lands. In *Broadus v. Hickman*[62] adverse possession of wild lands was sustained since the defendants had exercised public acts of ownership over the land which they would not exercise over property which they did not claim.

Easements

The Court held erroneous an instruction authorizing the recovery of damages caused by the laying of a pipeline, by virtue of an easement, through growing crops which the plaintiff had not expressly reserved when he conveyed the land upon which the crops grew.[63]

Gano v. Strickland[64] may be cited for the proposition that where adjoining landowners use a common driveway for the prescriptive period of ten years, during which time both make repairs to the driveway, an easement is acquired by each owner over the half of the driveway on the other's land.

Oil and Gas

The case of *Millette v. Phillips Petroleum Co.*[65] involved an action to have an oil and gas lease cancelled. The plaintiffs, who are the lessors, say that the "unless clause" should cancel the existing lease. The chancellor held that the bill must be dismissed, and the Supreme Court held that the complainants could not resort to an implied covenant on the part of the defendant to drill offset wells to prevent drainage by other wells on adjoining lands. There existed a clause in the mineral lease providing that in the event a well or wells producing oil or gas in paying quantities should

[61]211 Miss. 344, 51 So.2d 732 (1951).
[62]210 Miss. 885, 50 So.2d 717 (1951).
[63]Transcontinental Gas Pipeline Corp. v. Myrick, 51 So.2d 475 (Miss. 1951).
[64]211 Miss. 511, 52 So.2d 11 (1951).
[65]209 Miss. 687, 48 So.2d 344 (1950).

be brought in on adjacent land and within 150 feet of and draining the leased premises, then the lessee would drill offset wells. Such a stipulation is considered as being an "unless clause." The Supreme Court held that there was an implied covenant by the defendant not to drain oil from beneath complainant's land and that complainants by accepting delay rentals were not estopped to claim damages for waste caused by drainage.

Because of the mutual mistake of the lessee and the lessor county in estimating the number of acres in a section, the court in *Oliver v. Board of Supervisors*[66] reformed an oil and gas lease of school land.

Partition

The complainants in *Brown v. Jones*[67] were the owners in fee of a one-third undivided interest in certain lands. They filed a bill against the life tenants, remaindermen and contingent remaindermen of the remaining two-thirds interest for partition by sale, alleging that the property was incapable of division in kind. The chancery court ordered the land sold, with the owners of the fee simple to be paid their share, and the remainder to be held for the remaindermen with the interest each year to be paid the life tenants. Upon appeal to this court, the decree was reversed and bill dismissed . "There is no authority under our statutes for the partition or division of lands among fee simple owners and remaindermen or contingent remaindermen, by sale of the lands and division of the proceeds," said the court. The statute only permits the division of the land in kind and the setting aside to the owner in fee of his interest in the property. Under the circumstances of this case the life tenants should not be divested of their life estates.

Fixtures

It was held in *Connolly v. McLeod*[68] that a person who constructs a building on another's property with the implied permission of the property owner owns the building as personalty and is entitled to remove the building from the land. Further, the implied agreement does not come within the statute of frauds as an agreement involving the sale of an interest in land.

Trespass

When a person owns land by adverse possession, he obviously has a right of action for damages where trees are cut on such land due to a mistake as to the correct boundary line. However, in order for the statutory penalty to be awarded, there must be such a reckless disregard as to constitute willfulness and not just a reckless trespass.[69] It was said in one

[66]211 Miss. 447, 51 So.2d 766 (1951).
[67]210 Miss. 619, 50 So.2d 227 (1951).
[68]52 So.2d 473 (Miss. 1951).
[69]House v. Russell, 210 Miss. 57, 48 So.2d 628 (1950).

case that where the owner of the timber land had refused to sell his timber and had agreed with the defendant to pay half the cost of a survey, there was sufficient evidence to support the submission of the defendant's willfulness to a jury.[70]

In affirming the action of the county court and the circuit court in *Burton v. Redmond,*[71] the Supreme Court allowed the appellee to recover the taxes and the cost of improvements he had made upon a disputed strip of land awarded appellants. The award was based upon the statute,[72] the good faith of the trespasser, and estoppel.

Deeds

The Mississippi Supreme Court has said that ". . . the word 'conveyance' as used in Section 716 does not necessarily mean a deed of conveyance to be executed by the chancery clerk under Section 9958. . . ."[73] This language was used in disposing of complainant's contention that since the only record evidence of defendant's title was the tax collector's list of lands sold, there was not a "conveyance" within the meaning of the requirement that there must be occupation "under a conveyance by a tax collector" in order for a holder under a tax sale to assert good title.

An interesting question was raised in *Salmen Brick & Lumber Co. v. Williams.*[74] There the grantors under a 1922 deed reserved one-half the minerals. In 1926, the grantee by warranty deed conveyed the same land to others in fee but "reserving" to himself one-half of the minerals in the land in the same language used in the 1922 deed. The issue raised was whether the grants of the 1926 deed conveyed what he had received under the 1922 deed or whether he had retained the one-half mineral interest. The Court held with two dissents that the exception clause of the 1926 deed "merely described the interest owned by the Salmen Company (grantor), was designed to protect the grantor's warranty, [land] the grantee therein received all of the minerals owned by the grantor."

A provision in a deed which was held to be testamentary in character and therefore invalid to convey any interest in the property in question because of its failure to comply with the Wills Statute was as follows: "It is distinctly understood and agreed that grantor, is to live on, use, control, possess, etc., the above described property during my lifetime, and at my death, this deed to take effect and title to vest in grantee."[75]

Generally, when a deed of trust warrants full title, then the mortgagor's

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[70]Pippen v. Sims, 211 Miss. 194, 51 So.2d 272 (1951).
[71]211 Miss. 158, 51 So.2d 210 (1951).
[72]Miss. Code §§ 825, 826 (1942).
[73]Powe v. Brantley, 210 Miss. 627, 50 So.2d 229 (1951).
[74]210 Miss. 560, 50 So.2d 130 (1951).
[75]Peebles v. Rodgers, 211 Miss. 8, 50 So.2d 632 (1951).

heirs are estopped to assert such a deed to be invalid by showing the mortgagor had no title to part of the land and only an undivided one-half interest in the rest of such land.[76]

Where the chancery court in probating a will decrees that a mortgagor's predecessor in title has only a life estate and the decree is duly recorded, although not indexed, the decree constitutes constructive notice to a mortgagee and the mortgagee takes only the interest which the mortgagor had.[77]

XI

TORTS

Negligence

A number of cases have reiterated the proposition that questions of negligence and the amount of damages are for the jury to decide. In *Planters Wholesale Grocery v. Kincade*[78] the defendant contended that the plaintiff was guilty of negligence as a matter of law in not being able to stop within the range of his vision. In disposing of this contention the court cited a Louisiana case saying that the facts of each case will determine the question of negligence. Here, the accident had been caused by the defendant's failure to put out flares when his truck had a blowout. It was held that the awarding of punitive damages was proper under the circumstances and that a verdict of $30,000 was not excessive.

Also, it was held in a case where the plaintiff in a personal injury action threw himself from his bicycle to avoid being struck by the defendant's taxi-cab, the question of the negligence of the taxi-cab driver should have been submitted to the jury.[79]

The Court considered the case of *Southland Broadcasting Co. v. Tracy*[80] to be typically a case for the jury. The instruction granted to plaintiff which defendant complained of on appeal was held to be "harmless error" in view of the fact that twenty-seven different instructions were granted to the parties. The verdict of $25,000 was found not to be excessive.

In *Kincade & Lofton v. Stephens,*[81] however, the Supreme Court found the verdict to be excessive. There the plaintiff had fallen from a thirty-seven foot pole with the result that the lumbar vertebra in his back were flattened out and he was incapable of performing his usual work. The damages were reduced to $15,000 from $18,000 although only two

[76]Lee v. Magnolia Bank, 209 Miss. 804, 48 So.2d 515 (1950).
[77]Spearman v. Hussey, 210 Miss. 851, 50 So.2d 610 (1951).
[78]210 Miss. 712, 50 So.2d 578 (1951).
[79]Coker v. Five-Two Taxi Service, Inc., 211 Miss. 820, 52 So.2d 356 (1951).
[80]210 Miss. 836, 50 So.2d 572 (1951).
[81]50 So.2d 587 (Miss. 1951).

members of the Court agreed on the $15,000 sum. The Court said that it inferred the existence of some of the elements of corruption, passion, prejudice or bias on the part of the jury because of the "varying differences between the damage and the amount of the verdict." The opinion fails to mention the pain of the plaintiff. Justice Hall, joined by Justice Lee, dissented from the reduction of damages in a vigorous and well written opinion, saying that "Different minds have reached different results and yet the four minds overrule the fifteen and cast into the discard the prior decisions of this Court. . . ."

Consent is not strictly a defense to a charge of negligence "but rather negatives the existence in the defendant of any negligence at all."[82]

An instruction disapproved by the Supreme Court was to the effect that if the defendant was confronted with a sudden emergency by a child running in front of his bus, the defendant was "not held to the same accuracy of judgment" as ordinarily required if he "exercised ordinary care in the stress of circumstances to avoid hitting" the child. The Court stated that a different standard is not applied in cases of an emergency. "The conduct required is still that which is reasonable under the circumstances."[83]

The question of forseeability was involved in *Paramount-Richards Theatres, Inc. v. Price*.[84] With two dissents, the Court held that the placing of a mirrored post in a stairway used by theatre patrons could not make the theatre liable for injuries to a patron allegedly caused by the mirror. It was said that the theatre could not anticipate the accident of the plaintiff falling down the stair.

It was held in *Boyd v. Illinois Cent. R. Co.*[85] that where plaintiff's automobile collided with defendant's flat car placed in the center of a state highway without any warning lights on a dark night, the particular facts of the case put it within the exceptions to the rule that a freight car on a crossing is sufficient warning of its presence and therefore the question of the railroad's negligence was for the jury. The case seems to follow the modern trend toward the increasing recognition of the necessity of preventing obstruction of our highways.

Although there was no direct evidence of negligence in *General Benevolent Ass'n v. Fowler*[86] the Court held that the circumstantial evidence was sufficient to uphold the finding of the jury that plaintiff's infection was caused by a needle left in plaintiff's arm by defendant's employees.

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[82]J. M. Griffin and Sons, Inc. v. Newton Butane Gas & Oil Co., 210 Miss. 797, 50 So.2d 370 (1951).
[83]Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 50 So.2d 902 (1951).
[84]211 Miss. 879, 53 So.2d 21 (1951).
[85]211 Miss. 409, 52 So.2d 21 (1951).
[86]210 Miss. 578, 50 So.2d 137 (1951).

An instruction authorizing "such sum as will compensate him for pain and mental anguish" is improper in that it fails to connect the mental anguish with the physical suffering.[87]

Privacy as Defense

Where a sheriff strikes and kicks a photographer who is taking the sheriff's photograph in connection with a legitimate news story, the sheriff "can not complain that his right of privacy has been invaded." Furthermore, the photograph in the present case seemed to compare favorably with that of most of the other sheriffs he had known.[88]

Libel

In order for a plaintiff to recover for the publication of an allegedly libelous news story, the jury must find that the plaintiff's damages were caused by the publication and not by plaintiff's own acts.[89]

XII

TRUSTS, WILLS AND INTESTACY*

TRUSTS

Chichester v. Chichester[90] involved an action by the wife of deceased to have declared her one-half interest in mineral rights so purchasd by the defendant. The plaintiff is the sole beneficiary of the will of the deceased. She claims that prior to 1937, deceased gave $250 to his brother, the defendant, to be used in buying mineral rights in certain land, which they were to own in equal interests. The deceased was in the army from 1941 until 1945, at which time he died. The defendant's demurrer to the bill, on the Statute of Limitations, was sustained. Upon plaintiff's amending the bill to show that the deceased had been in the army for four years, the demurrer was overruled. Upon appeal, the decision was affirmed for the plaintiff. This court stated that an express trust must be in writing but that resulting trust need not be. Also, that the time spent in the army by the deceased is not to be considered in computing the Statute of Limitations. As involves the oral agreement between the deceased and the defendant, the court said "this states a perfect case of resulting trust."

The words "I instruct my son, according to agreement. . ." contained in a will are admonitory only and not dispositive. Neither do these words establish a contract to devise property after death of testator.[91]

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*Due to shortage of cases involving these subjects they will be treated under one section.

[87]Savey v. Gray, 51 So.2d 922 (Miss. 1951).

[88]Martin v. Dorton, 210 Miss. 668, 50 So.2d 391 (1951).

[89]Sheffield v. Journal Publishing Co., 211 Miss. 294, 51 So.2d 479 (1951).

[90]209 Miss. 628, 48 So.2d 123 (1950).

[91]Frierson v. Moorhead, 211 Miss. 811, 51 So.2d 925 (1951).

Where the heir of deceased was entitled to the contents of a safety-deposit box by virtue of a joint-tenancy agreement between the decased and the heir, the heir, as was held in *Duling v. Duling's Estate,*[92] is entitled to such contents notwithstanding the fact that the heir gave possession of the contents to a third party.

The case of *Old Ladies' Home Association v. Hall*[93] involved the circumstance of a promise by decedent to devise her home to complainant in return for complainant's taking care of decedent but decedent prevented complainant from carrying out his part of the contract. The Supreme Court ruled that since the complainant had several courses of action open to him at the time the decedent prevented him from performing, one of which was to wait until the time of performance by decedent, the Statute of Limitations would not bar this action.

WILLS

The question which arose in *Lake v. Harrington*[94] was whether a certain legacy passed by ademption or not. A will containing the certain legacy was later cancelled by a completely new will, such new will still establishing the certain legacy. There was an allegation that the legacy was adeemed since it was satisfied by advancements prior to the making of the new will. It was shown that the testatrix and the legatee were very close friends. Upon appeal it was held by this court that whether an ademption occurred or not is controlled by the intention of the testatrix and that legacies can be adeemed only by events occurring subsequent to their creation except where a prior advancement is made by a testator to an after named legatee under a binding agreement with that legatee that the advancement is in lieu of a later legacy. Here, the prior payments made by testatrix to the legatee's husband are not considered as satisfying the legacy established in the new will.

In Re Stoball's Will[95] showed that the petitioner and another had witnessed the testator's will and at the testator's request petitioner took custody of the will and kept it up until the time of this suit. Testator executed the will in 1938, married in 1940 and died in 1943. After testator's death the widow attempted to sell some wood on the property and petitioner warned the prospective purchasers not to deal with the widow. Immediately after the testator's death the petitioner began trying to locate the devisees under the will in order to purchase their interests. He was successful in this endeavor by the end of 1945, but none of the deeds conveying these interests were recorded until 1948. In 1945 the widow sued petitioner and others to remove the cloud on her title. A decree pro confesso was ren-

[92]211 Miss. 465, 52 So.2d 39 (1951).
[93]52 So.2d 650 (Miss. 1951).
[94]210 Miss. 74, 48 So.2d 845 (1950).
[95]211 Miss. 15, 50 So.2d 635 (1951).

dered in 1946. Some months later petitioner brought this suit for himself and as agent for the devisees, alleging that there was a will and asking that it be probated. In 1948, an amended petition was filed, and in 1949 the Chancellor found that since the petitioner was "trying to chisel the old woman out of her property" the will should not be admitted to probate. Upon appeal, this decision was affirmed holding that the petitioner's actions and the contestant's reliance thereon estops petitioner from probating the will. The later case of *Harrison v. Gatewood*[96] was held to be distinguishable from the *Stoball Case,* wherein the court found erroneous an instruction to consider, in testing the validity of the will, the length of time elapsed between the death of the testator and the offering of the will for probate.

INTESTACY

The Court, in considering *Henry et al v. Toney et al*[97] was confronted with a suit in chancery to cancel defendant's claim to certain land formerly owned jointly by his wife and the complainants. Defendant had killed his wife and pleaded guilty to manslaughter in Ohio. Complainants introduced this foreign judgment and rested. The trial court found that this evidence was conclusive of a willful killing under Section 479 of the Mississippi Code of 1942 and that defendant was therefore not entitled to inherit the property of his wife. The defendant was not allowed to testify as to the circumstances of the killing. The Supreme Court reversed this on appeal holding that by both Mississippi and Ohio law a plea of guilty to manslaughter does not necessarily admit a willful killing. Such plea "can only amount to slight evdience, or evidence merely that the killing has occurred." The court concluded the question by saying that "on a new trial of this case, all evidence which will throw any light on the issue of whether or not this killing was willful is competent and admissible, without regard to the action of the Ohio court."

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[96]211 Miss. 121, 51 So.2d 59 (1951).
[97]211 Miss. 93, 50 So.2d 921 (1951).

RECENT DECISIONS

Adverse Possession—Tacking

After having been in adverse possession of certain real estate for a period of seven years, the defendant's father deeded same to him, reserving a life estate in himself. The father died two years later and the defendant remained on the premises until this action was brought to recover possession, three years later. Held: The possession of the father could not be tacked to that of the son to satisfy the ten year statute of limitations. *Adams v. Adams,* 66 S.E.2d 809 (S.C. 1951).

Since the passage of the various statutes of limitations, the construction and application of these statutes in reference to occupancy of land has become known as the law of "adverse possession." Although the statutes of the different states vary considerably, the courts have recognized the general principle that adversity depends upon the existence and concurrence of possession which is hostile and under claim of title, actual, open and notorious, exclusive, and continuous.[1]

On the question of continuity, the problem arises whether the running of the statute is affected by the possession of two or more persons in succession where there is continuous hostility to the true owner by the successive possessors. This question is usually determined on the basis of whether there is privity between the successive parties based on contract, estate, or blood relationship.[2]

It is generally conceded that an heir can tack his possession with his ancestor's,[3] and that a devisee can tack possession with the devisor's,[4] and the general rule is that a grantee can tack his possession with that of his grantor.[5] South Carolina created the only exception to this rule early in that state's common law history by rejecting the reasoning of the majority that the adverse possessor owns an inchoate title in the land which may be transferred to a successive possessor.[6] The reasoning of the exception is that the majority rule confuses adverse possession with titles arising by presumption of grant or prescription; however, an adverse possessor is a trespasser and gains no right which he can transfer until the statute has run.

The flaw of the South Carolina view is its difficulty in reconciling the rule toward tacking by grantees with its rule toward tacking by an heir with an ancestor. The court refuses to recognize that an adverse possessor has "anything" that can be transferred by grant, while holding that possession can descend by operation of law.[7]

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[1]Alexander-City Union Warehouse & Storage Co. v. Central of Georgia RR., 182 Ala. 516, 62 So. 745 (1913); 2 C.J.S., Adverse Possession § 8; 1 Am. Jur., Adverse Possession § 126.

[2]Trueblood v. Pierce, 116 Colo. 221, 179 P.2d 671, 171 A.L.R. 1270 (1947); Campbell v. Gregory, 200 Ga. 634, 38 S.E.2d 295 (1946); Peoples v. Hagaman, 21 Tenn. App. 398, 215 S.W.2d 827 (1948).

[3]Bonds v. Smith, 143 F.2d 369 (D.C. Cir. 1944); Caraker v. Brown, 152 Ga. 677, 111 S.E. 51 (1922); Sauleyette v. McKee, 296 Ky. 868, 178 S.W.2d 833 (1944); Turk v. Wilson's Heirs, 266 Ky. 343, 96 S.W.2d 4 (1936); Campbell v. Whitehouse, 122 Me. 409, 120 Atl. 529 (1923); Barcus v. Gabreath, 207 P.2d 559 (Mont. 1950); Ramsey v. Ramsey, 224 N.C. 110, 29 S.E.2d 340 (1944); Lewis v. Smith, 187 Okl. 404, 103 P.2d 512 (1944); Goings v. Mitchell, 110 S.C. 380, 96 S.E. 612 (1918); East Tennessee Iron & Coal Co. v. Brayles, 95 Tenn. 613, 32 S.W. 761 (1895).

[4]Keyser v. Brown, 80 Ind. App. 504, 138 N.E. 514 (1923); Sowers v. Keedy, 135 Md. 448, 109 Atl. 143 (1919); Dunbar v. Aldrich, 79 Miss. 698, 31 So. 341 (1902); Hart v. Williams, 189 Pa. 31, 41 Atl. 983 (1899).

[5]Ringstad v. Grannis, 171 F.2d 170 (9th Cir. 1949); Howell v. Baskins, 212 S.W.2d 353 (Ark. 1948); Lively v. Week, 221 P.2d 374 (Colo. 1951); Bugner v. Chicago Title and Foral Co., 280 Ill. 620, 117 N.E. 711 (1917); Crowder v. Neal, 100 Miss. 730, 57 So. 1 (1911); Northcut v. Church, 135 Tenn. 541, 188 S.W. 220 (1916).

[6]Mazyek v. Wright, 2 Brev. 151 (1807) (*But see* dissent.)

The subject case does nothing to remove the confusion and only affirms that lone state's historical exception to the holdings of the other jurisdictions. This decision only confirms a seemingly resolved fact, viz., that South Carolina elects to continue its role as the lone dissenter and continue to pursue an illogical and even contradictory line of reasoning to reach an illogical, confusing, and socially undesirable result.

William F. Coleman

Conflict of Laws—State May Not Relitigate Issue of Domicile Upon Which Decree of Foreign State Rests Until Jurisdictional Vulnerability Shown

Husband discovered after marriage that there was an existing marriage between wife and third party. The wife then procured a divorce in a foreign state and remarried husband. In suit to annul both marriages the husband urged invalidity of the foreign decree on ground that the wife had not established domicile in the foreign state. Held: When it does not appear whether third party had either been served or had appeared in the foreign suit, the cause will be remanded for such determination before resolving issue of domicile. *Cook v. Cook,* 72 Sup.Ct. 157 (1951).

Where neither of the parties to a proceeding for divorce *a vinculo matrimonii* reside in the state in which the proceeding is brought, the courts of that state are without jurisdiction to hear and determine such proceeding.[1] The general rule being that the jurisdiction of proceedings for a divorce is dependent upon the domicile of the parties. *A fortiori,* at least one of the parties to the proceeding must be domiciled in the state or territory where the action is brought.[2] It is the *lex domicilii* which determines whether or not a marriage may be terminated by divorce.[3]

"Residence" and "domicile" are used interchangeably and are synonymous as respects matters of jurisdiction.[4]

It has been held that the appearance of a non-resident defendant does not and cannot create in the court jurisdiction of a suit instituted by one not a *bona fide* resident within the state.[5] However, recent decisions[6] have held that the fraudulent claim of domicile by a divorcing spouse is irrelevant to the enforceability in sister states of a decree of divorce if the other spouse contests or consents to the proceeding culminating in divorce.

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[7]Williamson & Brown Land & Lumber Co. v. Mullens Lumber Co., 249 Fed. 522 (4th Cir. 1918); Garrett v. Weinbury, 48 S.C. 28, 26 S.E. 3 (1896); Beadle v. Hunter, 3 Strob. 331 (S.C. 1848); Ellen v. Ellen, 16 S.C. 132 (1827); Pegues v. Worley, 14 S.C. 189 (1822).

[1]House v. House, 25 Ga. 473 (1858); State v. Armington, 25 Minn. 29 (1878); Keil v. Keil, 80 Neb. 496, 114 N.W. 570 (1908); Ditson v. Ditson, 4 R.I. 87 (1856); Restatement, Conflict of Laws § 111.

[2]Watkins v. Watkins, 125 Ind. 163, 25 N.E. 175 (1890); Van Fossen v. State, 370 Ohio St. 317, 41 Am. Rep. 507 (1881); Restatement, *op. cit. supra* note 1, § 111.

[3]Restatement, *op. cit. supra* note 1, § 110.

[4]Fangman v. Moyers, 90 Colo. 308, 8 P.2d (1932); Reubelmann v. Reubelmann, 38 Idaho 159, 220 Pac. 404 (1923); In re Ozias' Estate, 29 S.W.2d 240 (Mo. 1930); Soucy v. Knight, 161 Atl. 132 (R.I. 1932); Joy v. Marshall Field & Co., 51 S.W.2d 731 (Tex. 1932).

[5]Andrews v. Andrews, 188 U.S. 15 (1902); Lister v. Lister, 97 Atl. 170 (N.J. 1916) where a husband did not lose his residence in New Jersey and never became a *bona fide* resident of Nevada and committed a fraud upon the laws of both states in falsely swearing that he was such *bona fide* resident of Nevada, the appearance of the wife in such suit and her litigation thereof did not give the Nevada court jurisdiction.

[6]Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948) overruling, so far as inconsistent, Andrews v. Andrews, *supra* note 5.

There are numerous cases[7] where neither party was domiciled in the state rendering the divorce decree, and it was denied recognition in another state and, as discussed in the dissenting opinion in the subject case,[8] it was also obtained by fraud upon the court where it was rendered.

The court has held that a decree of divorce which is void where rendered is void everywhere[9] and if, subsequently one of the parties again contracts marriage it does not give validity thereto,[10] and is not a bar or defense to a subsequent action in another state.[11]

Where the complainant proceeds to a state other than his domicile to obtain a divorce and *animus manendi* is lacking, the defendant being also a non-resident of that foreign state, no state has been compelled to give full faith and credit unless at least one of the spouses was domiciled in the state whose court rendered the decree.[12] Under the full faith and credit clause of the federal constitution,[13] a state court is required to enforce a decree of divorce of a sister state as *prima facie* valid, *but only where the forum rendering the decree had jurisdiction.*[14]

When a judgment appears on its face to be a record of a court of general jurisdiction, it is presumed to have had jurisdiction over the parties and to be competent to render such judgment unless proven otherwise.[15] The decision in this case substantiates the equitable trend towards justice to all parties concerned by remanding for determination the *status* of the third party in the foreign jurisdiction.[16]

Frank W. Alexander

Constitutional Law—Applicability of Due Process Clause to Prohibit Admission of Illegally Obtained Evidence in State Court Trial

Defendant swallowed two morphine capsules which deputy sheriffs later forced *invitio* from him by means of an emetic solution, and he was convicted chiefly on the evidence of the capsules. Held: Method of conviction was in violation of Due Process Clause of the Fourteenth Amendment. "A state's prosecutions cannot be brought about by methods that offend a sense of justice." *Rochin v. State of California,* 72 Sup. Ct. 205 (1952).

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[7]Bell v. Bell, 181 U.S. 175 (1901); Streitwolf v. Streitwolf, 181 U.S. 179 (1901); Reed v. Reed, 52 Mich. 117, 17 N.W. 720 (1883); Sammons v. Pike, 108 Minn. 291, 120 N.W. 540 (1909); Carling v. Carling, 78 N.J.Eq. 42, 81 Atl. 565 (1910); Blondin v. Brooks, 83 Vt. 472, 76 Atl. 184 (1910).

[8]Cook v. Cook, 72 Sup.Ct. 157 (1951).

[9]De Bouchel v. Candler, 296 Fed. 482 (D.C. Ga. 1924).

[10]Simmons v. Simmons, 19 F.2d 690 (App. D.C. 1927); Lariviere v. Lariviere, 102 Vt. 278, 147 Atl. 700 (1929).

[11]Bethune v. Bethune, 192 Ark. 811, 94 S.W.2d 1043 (1936); Goolsby v. State, 24 Ga. App. 377, 100 S.E. 788 (1919); Wynn v. Wynn, 254 Ill. App. 254 (1929); Newton v. Newton, 13 N.J.Misc. 613, 179 Atl. 621 (1935); Woodford v. Woodford, 111 W.Va. 116, 161 S.E. 3 (1931).

[12]Shephard v. Ward, 5 N.J. 92, 74 A.2d 279 (1950) where wife, who was married and resided within the state, went to foreign state for the purpose of obtaining a divorce, and stating that she would undoubtedly return to the state after everything was "cleared up," she never acquired a domicile in the other state and judgment of court of other state granting a divorce was void.

[13]U.S. Const. Art. IV, § 1.

[14]Williams v. North Carolina, 325 U.S. 226 (1944); Achter v. Achter, 167 Pa. Super. 603, 76 A.2d 469 (1950).

[15]Spicer v. Spicer, 314 Ky. 560, 236 S.W.2d 474 (1951); Richardson v. Mitchell, 237 S.W.2d 577 (Tenn. 1951).

[16]*Quare:* Is this necessary when complainant is not in fact a resident of the foreign state and has no intention of making it such?

As early as the seventeenth century the English courts adopted as a rule of evidence the phrase *nemo tenetur seipsum accusare*,[1] probably in response to the protest against the inquisitional method of interrogating accused persons in the ecclesiastical courts.[2] This maxim having become clothed in this country with the stringency of a constitutional enactment, the Fifth Amendment to the Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself; nearly all of the state constitutions contain similar provisions.[3]

Is this provision in the Fifth Amendment also guaranteed by the Fourteenth Amendment as a limitation upon the powers of the states? The United States Supreme Court has held that the privilege against self-incrimination is not of such nature that it must be included in the concept of due process,[4] nor is the privilege against self-incrimination considered to be one of the guarantees of the Privileges and Immunities Clause of the Fourteenth Amendment.[5]

In *Brown v. Mississippi*[6] the Supreme Court stated that the state is free to regulate the procedure of its courts unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,[7] and that this freedom of the state is limited by the requirements of due process of law. Generally, due process in a procedural sense means a fair trial according to established state procedure.[8]

The Court in the subject case adopts once more the traditional view as to the problem of which of the first eight amendments are embodied and guaranteed by the Fourteenth Amendment. Cardozo's "implicit in the concept of ordered liberty" test in *Palko v. Connecticut*[9] is reasserted. Black and Douglas in concurring opinions reaffirm the basic premise as stated by Black in *Adamson v. California*,[10] that the first eight amendments are limitations on the states by virtue of the Fourteenth Amendment, though their position now seems less likely to be accepted by the present members of the Court.[11]

The specific application of due process to evidence obtained by means of a "stomach pump" is unique. Of course, it is true generally that coerced confessions are not admissible as evidence because of the dictates of due process under the Fourteenth Amendment.[12] Wigmore notes that the privilege against self-incrimination was established in the common law to protect one against testimonial confessions only,[13] and

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[1]14 AM. JUR., CRIMINAL LAW § 44.

[2]Wigmore, *The Privilege Against Self-crimination; its History*, 15 HARV. L. REV. 610 (1902).

[3]16 C.J.S., CONSTITUTIONAL LAW § 458, e. g., MISS. CONST. ART. III, § 26. "In all criminal prosecutions the accused shall have a right . . . and he shall not be compelled to give evidence against himself. . . ."

[4]Twining v. New Jersey, 211 U.S. 78 (1908). In the absence of a specific state constitutional guarantee against self-incrimination it has been held that such a privilege is secured by the due process clause of the state constitution. State v. Height, 117 Iowa 650, 91 N.W. 935 (1902).

[5]Twining v. New Jersey, *supra* note 4.

[6]297 U.S. 278, 285 (1936). Coerced confessions obtained by brutal beating were held to be in violation of Due Process Clause of Fourteenth Amendment.

[7]Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105 (1933).

[8]U.S. *ex rel.* Henson v. Mills, 21 F.Supp. 616 (E.D. Pa. 1937).

[9]302 U.S. 319 (1937).

[10]332 U.S. 46, 68-123 (1946).

[11]Murphy and Rutledge, who have since died, also dissented in the Adamson case, and went even further by making it clear that they would not limit protection of due process merely to the first eight amendments.

[12]Brown v. Mississippi, *supra* note 7.

[13]8 WIGMORE, EVIDENCE § 2263 (3d ed., 1940).

the modern rule is that the privilege against self-incrimination applies only to prevent testimonial compulsion.[14]

There is disharmony among the state decisions in regard to the power of a court to compel a defendant to submit to a physical examination.[15] In the subject case the Supreme Court has extended another specific type case into the scope of civil liberties guarded by the Due Process Clause of the Fourteenth Amendment.

Albert A. Covington

Contracts—Allowing Recovery of Automobile Won in Illegal Lottery

Eleven civic organizations held a lottery for the benefit of the defendant. The plaintiff was the holder of the ticket that won an automobile. The civic organizations turned the automobile over to the defendant to deliver to the winner. Upon the refusal of defendant to do so plaintiff brought a bill to compel delivery of the automobile. Section 226 of the Kentucky State Constitution prohibits lotteries and gift enterprises. By Kentucky statutes a felony penalty is imposed upon persons conducting a lottery,[1] and a misdemeanor penalty is imposed upon the purchaser of a lottery ticket.[2] Held: The defendant would not be allowed to raise the illegality of the lottery by which the plaintiff acquired a claim to the automobile as a defense. *Hardy v. St. Matthews Community Center,* 240 S.W.2d 95 (Ky. 1951).

The general rule is that the law will not aid either party to an illegal lottery contract.[3] There are exceptions, however, one of which is parties not in pari delicto.[4] The vendee of a ticket was allowed to recover the purchase price of the ticket in an action of assumpsit for money had and received where a statute imposed a felony penalty on the lottery holder, but no penalty upon the vendee.[5] The theory was that the statute was for the protection of a certain class;[6] the statute "marked the criminal;"[7] and the vendee, not being in pari delicto, could maintain the action. In the present case the court said it would not consider the parties in pari delicto even though both were "marked" by the statute. It has been held that where the statute

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[14]Model Code of Evidence, Rule 201, 205 (1942).

[15]People v. One 1941 Mercury Sedan, 74 Cal. App.2d 199, 168 P.2d 443 (1946) (pumping stomach to recover narcotic—due process not involved); State v. Ayres, 70 Idaho 18, 211 P.2d 142 (1949) (blood test to determine intoxication); Davis v. State, 189 Md. 640, 57 A.2d 298 (1948) (blood typing linking accused with murder); Skidmore v. State, 59 Nev. 320, 92 P.2d 979 (1939) (examination for venereal disease). *But cf.* State v. Height, *supra* note 4; State v. Weltha, 228 Iowa 519, 292 N.W. 148 (1949) (blood test to determine intoxication).

[1]Ky. Rev. Stat. § 436.360.

[2]Ky. Rev. Stat. § 436.380.

[3]People v. Lain, 57 Cal. App.2d 123, 134 P.2d 284 (1943); Asher v. Johnson, 26 Cal. App.2d 403, 79 P.2d 457 (1938); Troy Amusement Co. v. Attenweiler, 64 Ohio App. 105, 28 N.E.2d 207, *aff'd,* 137 Ohio St. 460, 30 N.E.2d 799 (1940); 54 C.J.S., Lotteries § 32.

[4]Nichols v. Johnson, 141 Ga. 89, 80 S.E. 556 (1913); Roney v. Crawford 135 Ga. 1, 68 S.E. 701 (1910); Mount v. Waite, 7 Johns. 434 (N.Y. 1811); 54 C.J.S., Lotteries § 36.

[5]Gray v. Roberts, 9 Ky. (2 A. K. Marsh.) 208, 12 Am. Dec. 338 (1820).

[6]Becker v. Wilcox, 81 Neb. 476, 116 N.W. 160 (1908); *accord,* United States v. Zweben, 13 F. Supp. 554 (S.D. N.Y. 1935), *aff'd sub nom* United States v. Wolper, 86 F.2d 715 (2nd Cir. 1936); Smith v. Bach, 183 Cal. 259, 191 Pac. 14 (1920); O'Connor v. Bankers Trust Co., 289 N.Y.S. 252, 159 Misc. 920 (1936); State *ex rel.* v. Holston Trust Co., 168 Tenn. 546, 79 S.W.2d 1012 (1935).

[7]United Bank and Trust Co. v. Joyner, 40 Ariz. 229, 11 P.2d 829 (1932); Turney v. Tillman, 112 Or. 122, 228 Pac. 933 (1924); State *ex rel.* v Holston Trust Co., *supra* note 6. American Nat. Ins. Co. v. Tabor, 111 Tex. 155, 230 S.W. 397 (1921); 6 Corbin, The Law of Contracts § 1540 (1951).

imposes a penalty on both parties, they are in pari delicto.[8] Though the court went to great length in discussing this problem of pari delicto, it had nothing to do with this case as this was not a suit between parties to the illegal contract.

But the defendant claims that by compelling him to deliver the automobile to the plaintiff the court would be enforcing a contract in violation of public policy declared by a statute which, by virtue of the general rule, should not be enforced.[9] The court avoids this rule by saying that this is not a suit upon the illegal contract but upon an implied promise by the defendant to the lottery holder to become bailee of the automobile for the plaintiff. The rule in this instance is that if the plaintiff can establish a good cause of action the defendant cannot raise the illegal bargain as a defense,[10] but the plaintiff must state a cause of action without resorting to the illegal transaction.[11] If a ticketholder delivers his tickets to an agent and a prize is won, the courts will allow the former to recover the prize from the agent on the agency contract.[12] However, in the present case there is no privity between the defendant and the plaintiff, and hence no suit on a contract between the two. The plaintiff's only action, therefore, must have been based upon an implied promise by the defendant to the lottery holder to hold the goods for the plaintiff as beneficiary of a trust or contract. It is probable that the lottery holder and the defendant would deny the existence of such trust or contract. There is a question as to whether the plaintiff could establish such relationship without referring to the illegal lottery contract, thus denying herself a remedy in equity.[13] The more logical action would have been one of replevin in a court of law.

The Kentucky court seems to have been guilty of faulty reasoning in considering the statute as being for the personal protection of the plaintiff in this case. Rather, the statute, by discouraging lotteries, is for the protection of the public in general. It is contended that the court, by allowing the plaintiff to recover the prize, destroys the effect of the statute.

Elwood L. Edwards

Contracts—Statute of Limitations on Anticipatory Breach

Defendant demurred to bill asking specific performance where the promisor had contracted in 1938 to devise land to the plaintiff on her death in return for the promise for personal services and expenditures until the death of the promisor, which occurred in 1950. The promisor had prior to her death prevented the promisee from fully performing by ordering the promisee in 1943 from her home. Lower court overruled the demurrer and allowed interlocutory appeal. Held: Promisee may elect to keep

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[8]Becker v. Wilcox *supra* note 4.

[9]Campbell v. Stiles, 300 Ky. 745, 190 S.W.2d 347 (1945); Scott v. Vizard, 207 Ala. 70, 91 So. 806 (1921); Pryor v. Gowan, 204 Ala. 257, 85 So. 370 (1920); Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735 (1891); Driscoll v. New Haven, 75 Conn. 92, 52 Atl. 618 (1902); Glennville Inv. Co. v. Grace, 134 Ga. 572, 68 S.E. 301 (1910); Sprague v. Rooney, 104 Mo. 349, 16 S.W. 505 (1891).

[10]Leake v. Isaacs, 262 Ky. 640, 90 S.W.2d 1001 (1936); Mata v. Katsoulas, 192 Wis. 212, 212 N.W. 260 (1927); *accord,* McBlair v. Gibbes, 17 How. 232 (U.S. 1855); Kearney v. Webb, 278 Ill. 17, 115 N.E. 844 (1917); Edward Thompson Co. v. Pakulski, 220 Mass. 96, 107 N.E. 412 (1915); Gilliam v. Brown, 43 Miss. 641 (1870); Roselle v. Beckmeir, 134 Mo. 35 S.W. 1132 (1896); Hertzler v. Geigley 196 Pa. 419, 46 Atl. 366 (1900).

[11]Armstrong v. American Exchange Nat. Bank, 133 U.S. 433 (1890); Dent v. Ferguson, 132 U.S. 50 (1889); Ross v. Lincoln Saving & Loan Association, 178 Ark. 1134, 13 S.W.2d 600 (1929); 34 Am. Jur., Lotteries § 34.

[12]See note 8, *supra.*

[13]Roundtree v. Ingle, 94 S.C. 231, 77 S.E. 931 (1913).

the contract alive after the breach and compute the statutory period of limitations[1] from the time when ultimate payment or performance was promised, on the death of the promisor, and not from the time of the anticipatory repudiation. *Old Ladies Home Ass'n v. Hall,* 52 So.2d 650 (Miss. 1951), *suggestion of error overruled.* 54 So.2d 170, (Miss. 1951).

In this opinion the court stated that the promisee has three remedies where the promisor completely repudiates the contract: (1) To rescind the contract; (2) To treat it as still binding and wait until the time arrives for its performance by the promisor, and at such time to bring an action on the contract; (3) To treat the renunciation as an immediate breach and sue at once for any damages which he may have sustained. The court extends its views,[2] as expressed in earlier opinion,[3] that where the promisor disavows the agreement and states his intention not to comply therewith, there is an anticipatory breach of the promise, and an action for damages then accrues.

In this case, one of first impression, the Mississippi court aligns itself with the generally accepted view.[4] However, the election accorded the promisee is criticized by several authorities[5] which assert that when the promisor terminates the contract, there is an actual breach, and it may be possible for the promisee to enhance his damages if accorded these elections.

One decision[6] contra to the subject case, held that an oral contract was breached when the promisor repudiated the contract and that if a cause of action existed, it accrued then. A distinguishing feature may exist, however, in the court's finding that a complete breach was effected because the promisor could not fulfill the contract when performance would become due.

A recent decision[7] held in a similar situation, that a suit for specific performance would be prematurely brought during the lifetime of the promisor.

It is submitted that in an action brought before the death of the promisor, the defense of repudiation of the breach and a promise to perform at death should be a bar to the action if for specific performance,[8] but not a defense if the action was brought for damages incurred.[9]

Harley A. Weeks, Jr.

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[1]Miss. Code § 722 (1942).

[2]Johnson v. Tomme, 199 Miss. 337, 24 So.2d 730 (1945).

[3]Carter v. Witherspoon, 156 Miss. 597, 126 So. 388 (1930). There a suit was brought before the promisor's death and the court said, "It is true that *ordinarily* an agreement to devise or bequeath property is not broken until the death of the promisor without the devise or bequeath having been made." (Emphasis added). Graham McNeil Co. v. Scarborough, 135 Miss. 59, 99 So. 502 (1924) where the court held that the statute of limitations does not begin to run until the cause of action accrues, and that a cause of action accrues when a person has a right to sue upon the claim. In Clark & Co. v. Miller, 154 Miss. 233, 122 So. 475 (1929) the court said, "The intention to abandon the contract at some future date is not a breach of it unless such intention is in positive terms and unconditionally. When it is so declared, the other party has an opportunity to accept the declaration if he chooses to do so."

[4]Gold v. Killeen, 44 Ariz. 29, 33 P.2d 594 (1934); Note, 94 A.L.R. 448 (1934).

[5]6 Willston and Thompson, Contracts § 2027 (rev. ed. 1938).

[6]Muir v. Shick, 188 Okla. 331, 108 P.2d 544 (1940).

[7]Watson v. Hobson, 401 Ill. 191, 81 N.E.2d 885 (1948).

[8]17 C.J.S. § 472, but in Massachusetts and Nebraska the rule allowing an immediate action for an anticipatory breach of contract is not recognized.

[9]*Contra,* Warden v. Hinds, 163 Fed. 201 (4th Cir. 1908), where the court said that there could be no breach while the promisor lived, for in the very last moment of his life he may carry out his expressed intention.

Labor Law—Judicial Review of NLRB Representation Ruling

Plaintiff's (employer) labor contract with Union *A* expired and a new one was made. On the same day Union *B* filed a petition for an election. NLRB ruled that because the union-security clause of the contract was invalid the entire agreement was illegal and ineffectual as a bar to a new election and denied plaintiff's motion for a rehearing, although the only issue was whether *B's* petition ante-dated the effective date of the contract. Plaintiff then sued for a declaratory judgment on the validity of the contract and for an injunction against certification of Union *B*, alleging denial of certain constitutional rights. Held: Where the constitutional issues raised are not apparently frivolous and the method of review under the statute is inadequate, a district court of the United States has jurisdiction to review a NLRB representation ruling. Relief was denied, however, because there was no showing of irreparable injury to the plaintiff.[1] *Worthington Pump & Machinery Corp. v. Douds,* 97 F. Supp. 656 (S.D.N.Y. 1951).

Under the LMRA,[2] judicial review of representation proceedings can be obtained only when there is an appeal from a *Board* order involving an unfair labor practice. A certification by the *Board* is not an order reviewable by the courts under the Act.[3] Assuming the existence of valid constitutional issues the remedy is speculative merely because there can be no certainty that one in *B's* position will or can charge an unfair labor practice.

Some district courts have provided a remedy by taking jurisdiction of suits for declaratory judgments and injunctions,[4] while other courts have refused to do so. The Supreme Court of the United States has failed to answer the question on two occasions.[6]

In taking jurisdiction the courts prevent a possible abuse of power and discretion on the part of the *Board* since they have power to set aside *Board* orders.[7] While in the subject case the court refused to grant the injunction because the potential injury from economic pressure was too remote, it does not appear whether it is also refusing relief on the suit for declaratory judgment. Such would seem to be the conclusion, however, from the treatment given these procedural devices by the courts.[8] The important factor is that through use of these procedural devices jurisdiction was taken.

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[1]The question of review as applied to the subject case may be mooted by virtue of NLRB's decision in *Charles A. Krause Milling Co.,* 97 N.L.R.B. 75. There the Board ruled a union-security clause similar to the one in the subject case valid. See 14 Geo. Wash. L. Rev. 312 (1946) for good discussion of this question from viewpoint of unions. Although directed toward the Wagner Act, it is just as suitable to the Taft-Hartley Act since the applicable sections of both statutes are the same.

[2]61 Stat. 136, 29 U.S.C. § 159(d) (1947).

[3]A. F. of L. v. N.L.R.B., 308 U.S. 401 (1940), *aff'd,* 103 F.2d 933 (D.C. Cir. 1939).

[4]Fay v. Douds, 172 F.2d 720 (2nd Cir. 1949); Inland Empire District Council v. Graham, 53 F.Supp. 369 (W.D. Wash. 1943); *aff'd,* 42 F.2d 455 (9th Cir. 1944); Klein v. Herrick, 41 F. Supp. 417 (S.D.N.Y. 1941); A. F. of L. v. Madden, 33 F. Supp. 943 (D.C. Cir. 1940); I.B.E.W. v. N.L.R.B., 41 F. Supp. 57 (E.D. Mich. 1940).

[5]Fitzgerald v. Douds, 167 F.2d 714 2nd Cir. 1948); Employee's Protestive Ass'n. of Norfolk v. N.L.R.B., 147 F.2d 684 (4th Cir. 1945).

[6]Inland Empire District Council v. Millis, 325 U.S. 697 (1945), *aff'd* 144 F2.d 539 (D.C. Cir. 1944); A. F. of L. v. N.L.R.B., 308 U.S. 401 (1940), *aff'd* 103 F.2d 933 (D.C. Cir. 1939).

[7]A. F. of L. v. Madden, *supra* note 4; I.B.E.W. v. N.L.R.B., *supra* note 4.

[8]Davis, Administrative Law § 214 (1951).

In view of the need for a more definite remedy than that provided by the statute when constitutional issues are raised in representation proceedings, the decision in the subject case would seem to be correct. In granting this remedy to the employer the decision is strengthened by the fact that the Taft-Hartley Act[9] was specifically designed to grant employers protection not afforded them in the Wagner Act, thereby minimizing any differences in rights granted unions and employers.

James H. Ray

Oil and Gas—Assignment or Sublease

In a suit brought to clear title the court held that when an oil well was drilled on land which had been leased originally on condition that an oil well be drilled, the condition had been fulfilled not only as to the portion of land remaining in original lessee's possession but also to parts of original tract which had been previously assigned by original lessee. *Berry v. Tidewater Associated Oil Co.,* 188 F.2d 820 (5th Cir. 1951).

Mississippi holds that oil and mineral deposits are corporeal hereditaments and are susceptible of separate and distinct ownership apart from the surface.[1] Since the court has adopted this view, leases of oil and gas operate as if they were estates in land. In an assignment of a leasehold or part of one which is divisible, the lessee parts with his entire interest in the estate and the assignee holds directly of the original lessor.[2] There is no relationship or privity of estate between the original lessee and his assignee, and the assignee's lease, conditioned upon the drilling of an oil well, cannot be kept in force by the drilling of a well on the land of the original lessee. Louisiana so holds[3] for the reason that since there is no longer any relationship between the original lessee and his assignee, the former cannot benefit the latter by his acts.[4] This is probably a correct interpretation if classical rules of real property are followed but this view has one fallacy. A condition cannot be apportioned and that is what is done when part of the property is held by the original lessee and part is assigned.[5] To apportion a condition destroys it.[6] If this view—and it, too, is a classic rule of real property—were followed, neither the lessee nor assignee would have to drill at all during the entire term.

The great majority of the states have refused to follow the reasoning of the Louisiana Court and hold that an assignment of a portion of the land leased acts somewhat like a sublease and a drilling on one portion of the land accrues to the benefit of the assignees whose leases are on condition that a well be drilled.[7] Even

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[9]See 29 U.S.C. §§ 151, 158 (1947).

[1]Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927).

[2]Robertson v. Pioneer Land Co., 173 La. 313, 137 So. 46 (1931). Doty v. Heth, 52 Miss, 530 (1876).

[3]Roberson v. Pioner, *supra* note 2.

[4]Roberson v. Pioner, *supra* note 2.

[5]Brewer v. Lanyon Zinc Co., 140 Fed. 801 (8th Cir. 1905).

[6]Brewer v. Lanyon Zinc Co., *supra* note 5. 1 Washburn Real Property 508 (5th ed.).

[7]Sinclair Prairie Oil Co. v. Campbell, 164 F.2d 907 (5th Cir. 1947); Cosden Oil Co. v. Scarbourough, 55 F.2d. 634 (5th Cir. 1922); Pearson v. Black, 120 S.W.2d 1075 (Tex. 1950); Gypsy Oil Co. v. Cover, 78 Okla. 158, 189 Pac. 540 (1920); State *ex rel.* Shell Petroleum v. Worden, 44 N.M. 400, 103 P.2d 124 (1940); Cadillac Oil . . . Co. v. Harrison, 196 Ky. 290, 244 S.W. 169 (1935); Cowman v. Phillips Petroleum Co., 142 Kan. 762, 51 P.2d 988 (1935); Harris v. Michael, 70 W.Va. 356, 73 S.E.934 (1912); Fisher v. Crescent, 178 S.W. 905 (Tex. 1915); Standard Oil Co. of La. v. Giller, 183 Ark. 776, 38 S.W.2d 766 (1931); Ohio Oil Co. v. Fowler, 74 Ind. App. 1, 128 N.E. 626 (1920).

when the land though owned separately[8] or separately by husband and wife[9] is leased in one block, the courts have held that the enitre lease will remain in force so long as a well is drilled on any portion. These results are reached on ground that an assignment was contemplated[10] or that lessee by drilling intends to confer a benefit on his assignee.[11] Perhaps the most logical reason this result is reached is that "common sense requires it,"[12] and "new principles are hard to adopt to old forms."[13]

Charles N. Dean

Tort—Liability of Municipal Corporations for Tort Committed by its Employees

Plaintiff, an employee of the defendant municipality, while performing his duties as a driver for the fire department operated by the defendant, negligently injured a third party and in an action brought by this injured party, judgment was allowed against the plaintiff. There was a statute which provided that the defendant would carry liability insurance up to a certain amount on all of its vehicles. This statute provided no penalty in the event that such insurance was not carried. Plaintiff seeks to recover from the defendant municipality as much of the judgment rendered against him as possible on the ground that the statute was for his benefit. Held: At common law the municipality would have been immune from liabilities arising under governmental duties, and since the statute failed to express a penalty for non-compliance by the municipality, the common law must be followed and the plaintiff denied reimbursement. *Osback v. Lyndhurst Township,* 7 N.J. 371, 81 A.2d 721 (1951).

The majority of the court in absolving the municipality from liability of this nature is expressing again the age old doctrine that the municipal corporation has been vested with a dual character and also with dual liabilities—governmental, political, or public and corporate, private or proprietary. In so holding, the court is again binding itself by stare decisis. The cases are myriad which hold that the municipality is discharged from any liability while performing its governmental duties,[1] but the same courts will allow liability in torts committed while performing corporate duties.[2] This distinction was first set out in the eighteenth century by the English courts.[3] Over the span of years, it has become entrenched in the American judicial system and today, many courts feel that it would take legislative action to hold otherwise.[4] Some

[8]Southern Penn. Oil Co. v. Snodgrass, 71 W. Va. 438, 76 S.E. 961 (1912).
[9]Ohio Oil Co. v. Fowler, *supra* note 7.
[10]Cosden Oil Co. v. Scarbourough, *supra* note 7.
[11]Pearson v. Black, *supra* note 7.
[12]Cosden Oil Co. v. Scarbourough, *supra* note 7.
[13]Monaghan v. Mount, 36 Ind. App. 188, 74 N.E. 579 (1905).

[1]Harrison v. District of Columbia, 256 U.S. 650 (1921); Densmore v. Birmingham, 223 Ala. 210, 135 So. 320 (1931); Taylor v. Shreveport, 29 So.2d 792 (La. 1947); 6 McQuillin, Municipal Corporations § 2793 (2d ed. 1928); 63 C.J.S., Municipal Corporations § 746 n.16. But where such immunity has been denied under admiralty law, see Workman v. New York City, 179 U.S. 552 (1900); Kelly Island Lime and Transport Company v. Cleveland, 47 F.Supp. 533 (N.D. Ohio 1942).

[2]McSheridan v. Talladega, 243 Ala. 162, 8 So.2d 831 (1942); Chafor v. Long Beach, 174 Cal. 478, 163 Pac. 670 (1917); Roumbos v. Chicago, 332 Ill. 70, 163 N.E. 361 (1928); Missano v. New York, 160 N.Y. 123, 54 N.E. 744 (1899); 6 McQuillin, Municipal Corporations § 2792 (2d ed. 1928); 63 C.J.S., Municipal Corporations § 746 n.26. South Carolina stands alone in denying recovery for torts arising from corporate activities as shown in Abernathy v. Columbia, 213 S.C. 68, 48 S.E.2d 585 (1948); Irvine v. Greenwood, 89 S.C. 511, 72 S.E. 228 (1911).

[3]Russell v. Men of Devon, 2 Term. Rep. 667, 100 Eng. Rep. 359 (1798).

[4]Green v. Birmingham, 241 Ala. 684, 4 So.2d 394 (1941); Taylor v. Berwyn, 372 Ill. 124, 22 N.E.2d 930 (1939); Paul v. Faricy, 37 N.W.2d 427 (Minn. 1949); *See* Meridian v. Beeman, 175 Miss. 527, 166 So. 757 (1936) (dissenting opinion); Scibilia v. Philadelphia, 279 Pa. 549, 124 Atl. 273 (1924).

of the primary arguments for this distinction used by the courts are that the city derives no benefits from the exercise of governmental functions which are performed for the benefit of the public;[5] that the doctrine of respondeat superior does not apply;[6] that taxes should not be used to pay for the torts committed by employees of the municipality;[7] that such duties were imposed upon it by the legislature and were not entered into voluntarily.[8]

The chief problem with which the courts have found themselves faced has been determining the line of demarcation between these two classes of duties. To date, there has been no specific rule set out by any court to ascertain this distinction, but each case must be determined by the facts[9] and by the public policy recognized in each jurisdiction.[10] Many courts will imply liability if the act is performed primarily for the benefit of those within the corporate limits of the municipality,[11] but the same courts will indicate that immunity exists if the act performed is public in character and performed as agent of the state in furtherance of general law for the interest of the public at large.[12] If this is the test that is to be applied here, then it would appear that the majority opinion is incorrect since it can be inferred that the reason for such a statute was for the protection of the plaintiff, one within the corporate limits of the municipality.

Today there is a strong trend in the direction of limiting the immunity of a municipal corporation[13] and some courts have held that where there is doubt, it will be decided against immunity, thereby restricting its use instead of expanding it.[14] Advocates of this change would allow recovery against any municipality for torts committed by any of its employees in performance of either corporate or governmental duties.[15]

Although neither of the three dissenting judges were moved to compose an opinion expressing their opposition to the granting of this immunity to the municipal-

[5]Howard v. Worcester, 153 Mass. 426, 27 N.E. 11 (1891); Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332 (1877); 4 DILLON, MUNICIPAL CORPORATIONS §§ 1642, 1634, 1660 (5th ed. 1911).

[6]Merrill v. Wheaton, 379 Ill. 504, 41 N.E.2d 508 (1942); Everly v. Adams, 95 Kan. 305, 147 Pac. 1134 (1915); Burrell v. Augusta. 78 Me. 118, 3 Atl. 177 (1886); 4 DILLON, MUNICIPAL CORPORATIONS § 1655 (5th ed. 1911).

[7]Coolidge v. Brookline, 114 Mass. 596 (1874); Riddle v. Proprietors of Locks and Canals, 7 Mass. 187, 5 Am. Dec. 35 (1810).

[8]Boise Dev. Co. v. Boise City, 30 Idaho 675, 167 Pac. 1032 (1917); Evans v. Sheybogan, 153 Wis. 287, 141 N.W. 265 (1913); 6 McQUILLIN, MUNICIPAL CORPORATIONS § 2623 (2d ed. 1928).

[9]Barth v. Miami, 146 Fla. 542, 1 So.2d 547 (1941); Costello v. Aurora, 295 Ill. App. 510, 15 N.E.2d 38 (1938); Waco v. Thompson, 127 S.W.2d 223 (Tex. Civ. App. 1939).

[10]Baltimore City v. State, 173 Md. 267, 195 Atl. 571 (1937).

[11]Mobile v. Lartigue, 23 Ala. App. 479, 127 So. 257 (1930); Lisk v. West Palm Beach, 160 Fla. 632, 36 So.2d 197 (1948); Miami v. Oates, 152 Fla. 21, 10 So.2d 721 (1942); Splinter v. Nampa, 215 P.2d 999 (Idaho 1950); Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948).

[12]See note 10, *supra*; Huffman v. Columbus, 51 N.E.2d 410 (Ohio App. 1943); State *ex rel.* Hurd v. Blomstrom, 72 S.D. 526, 37 N.W.2d 247 (1949).

[13]Bragg v. Board of Public Instruction of Duval County, 160 Fla. 590, 36 So.2d 222 (1948); Barker v. Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943). See Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924), 36 YALE L.J. 1, 757, 1039 (1926), 28 COL. L. REV. 577, 734 (1928).

[14]Brown v. Sioux City, 49 N.W.2d 853 (Iowa 1951); Barker v. Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943); New Mexico Products Co. v. New Mexico Power Co., 42 N.M. 311, 77 P.2d 634 (1937).

[15]Kaufman v. Tallahassee, 84 Fla. 634, 94 So. 697 (1922); *see* Fowler v. Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919) (Concurring opinion). Fowler Case later overruled by Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).

ity, their dissent alone is an indication that they desired to release themselves and the court from this antiquated precedent.

Courts are slowly slicing away, by various means,[16] this erroneous and illogical precedent as established by the English common law courts, but until the new idea is accepted by all the courts, the public will continue to spend vast sums in litigation trying to discover the answer.

Jesse D. Puckett

Traffic Regulation—Vehicles Having Special Privileges

Defendant city's fire truck, delivering an inhalator in response to a call, collided with the plaintiff's car at a street intersection. Held: The truck was not an "ambulance" within the purview of the statute[1] exempting such vehicles from the speed limits; nor was the truck on "official business" such as to come within the statute[2] granting right of way privileges to fire department vehicles. *Tiedebohl v. Springer,* 55 N.M. 495, 232 P.2d. 694 (1951).

Acknowledging a well-founded public interest, many motor vehicle laws exempt from their operation certain public service vehicles and grant special privileges to certain vehicles when used in emergencies.[3] In interpreting such statutes, it has been held that the extent of the grant is limited by its express terms,[4] that exemptions will not be unduly extended by implication,[5] and that the inclusion of certain vehicles implies the exclusion of others.[6] Though the result of the subject case is in accord with these decisions, there are cases which indicate that a contrary result might have been reached. For instance, a fire call has been held to be an "emergency" permitting excessive speed by a motorcycle policeman,[7] a police car has been held to be within the classification "fire patrol vehicle" when answering a fire call,[8] a motorcycle has been held to be within the statute exempting "police patrol wagons,"[9] and a police lieutenant responding to a fire alarm in a police car has been held to be acting within the line of "duty."[10]

The Mississippi Code (1942) provides in Section 8148, Paragraph (b) that the ". . . driver of any authorized emergency vehicle when responding to an emergency call . . ." shall have the right to proceed with caution through stop signs or stop signals. Under a similar statute it has been held that whether a vehicle is an authorized emergency vehicle is to be determined by the type of ownership, whether public or private, and the use to which the vehicle is devoted at the particular time in question.[11] Further, it would be necessary to show that the vehicle had received authorization

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[16]See note 13, *supra*; Erickson v. Fitzgerald, 342 Ill. App. 233, 96 N.E.2d 382 (1950); Koeppe v. Hudson, 276 App. Div. 443, 95 N.Y.S.2d 700 (1950).

[1]N.M. Stat. Ann. (1941) § 68-509.

[2]N.M. Stat. Ann. (1941) § 68-519.

[3]Falasco v. Hulen, 6 Cal. App.2d. 224, 44 P.2d. 469 (1935); Miami v. Thigpen, 151 Fla. 800, 11 So.2d. 300 (1942); Russell v. Nadeau, 139 Me. 286, 29 A.2d. 916 (1943); Travis v. Collett, 218 Minn. 592, 17 N.W.2d. 68 (1944); and see Miss. Code (1942) §§ 8148 (b), 8180.

[4]Travis v. Collett, *supra* note 3; Dowler v. Johnson, 225 N.Y. 39, 121 N.E. 487 (1918).

[5]Buck v. Ice Delivery Co., 146 Or. 132, 29 P.2d. 523 (1934).

[6]Thomas v. Dahl, 293 Ky. 808, 170 S.W. 337 (1943).

[7]Koger v. Keller, 120 Kan. 196, 243 Pac. 294 (1926).

[8]Long v. Schumacher, 342 Pa. 356, 20 A.2d. 765 (1941).

[9]Edberg v. Johnson, 149 Minn. 395, 184 N.W. 12 (1921).

[10]Town of Amherst v. United States, 77 F. Supp. 80 (1949).

[11]Livezey v. Rogers, 31 Cal. App.2d. 412, 88 P. 2d. 412 (1939).

from the proper agency.[12] Assuming the facts of the subject case to have occurred in a jurisdiction having a statute similar to that of Mississippi, it seems that the truck might easily have been accorded right of way privileges.

There is, however, a strong policy argument in opposition to such an extension of traffic privileges and rights.[13] The New Mexico court, in the subject case, has this to say on that point: "To give it (the statute) the interpretation suggested by the defendant . . . would increase the hazards to the traveling public."[14] It is submitted that this view, and the position taken by the court, better serves the public in every aspect of the problem.

Thomas K. Watts

Workmen's Compensation—For Death Caused by Mental Strain and Excitement

Action to recover for the death of fifty-seven year old operator of a trolley has who died from coronary thrombosis brought on by nervous excitement and mental strain while driving at night in a dense fog. Decedent had suffered from a heart condition for about a year prior to his death. Held: The court's instruction to the jury that mere mental strain or worry was not an injury within the meaning of the compensation law was prejudicial error. Judgment denying compensation was reversed and the cause remanded. *McNees v. Cincinnati Street Railway Co.*, 101 N.E.2d 1 (Ohio 1951).

Generally there is liability for death benefits under workmen's compensation law only where the death results from an injury which is received in the course of and arises out of the employment. The rule is clear and definite, but difficulty arises and differences appear in its application. It has been held to be compensable when death resulted from coronary occlusion which was precipitated by over exertion,[1] and when resulting from coronary thrombosis three months after a heart attack which was due to physical strain at work.[2] Compensation has been denied where death resulted from a heart attack during employment, but there was no showing of accident preceding the attack.[3] However, where the attack came after unusual excitement and long hours of work it was considered to have been caused by industrial accident.[4]

Personal injury, in some instances, is considered to be limited to violence to the physical structure of the body and such diseases or infections as naturally result therefrom, and death due to natural causes which occurs during work is not deemed compensable.[5] On the other hand, compensation has been allowed for death caused by cerebral hemorrhage which resulted from nervous strain of a fireman while fighting fire,[6] and where an employee died as a result of a heart attack precipitated by shock from a fight between two fellow employees.[7]

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[12]Walsh v. Dallas Ry. & Terminal Co., 140 Tex. 385, 167 S.W. 1018 (1943).

[13]Though privileges existed in favour of police and fire department vehicles even in the absence of statutory grant, Balthazar v. Pacific Electric Ry. Co., 187 Cal. 302, 202 Pac. 37 (1921), this implied immunity was not extended to include ambulances, Buck v. Ice Delivery Co., *supra* note 5.

[14]232 P.2d. 694, 696 (1951).

[1]Peter Kiewit Sons Co. v. Industrial Commission of Colorado, 236 P.2d 296 (Colo. 1951).

[2]Leventhal v. W. B. & V. Rye Bread Corporation, 101 N.Y.S.2d 800 (1951).

[3]La Viness v. Mauer, 53 So.2d 113 (Fla. 1951).

[4]Mueller v. Rutgers Club, Inc., 101 N.Y.S.2d 953 (1951).

[5]Industrial Commission v. Cross, 104 Ohio St. 561, 136 N.E. 283 (1922).

[6]Fox v. City of Plainfield, 77 A.2d 281 (N.J. 1951).

[7]Krawczyk v. Jefferson Hotel, 103 N.Y.S.2d 40 (1951).

There are many instances where deaths resulting from extra or unusual exertion during employment have been held compensable,[8] and such actions give support to the holding in the main case.

Here mental strain and worry do not seem to be compensable injuries as such, but where mental strain and worry have precipitated or hastened death they have been effectively used to establish causal connection between the employment and ultimate death.[9] A predisposition for heart trouble does not prevent a determination of compensability for it has been held that a person so afflicted may recover for an injury which would not have occurred had the employee been a healthy person.[10]

With such diversity of holdings for death resulting from coronary thombosis caused by mental strain and worry as well as heart ailments generally, it seems that one should first look for some evidence of unusual physical strain or exertion. However, if none is present, the door is not closed because the circumstances of the employment at the time of the mental strain or worry might be such that a definite causal connection could be established between the injury and employment.

With the increase in the knowledge of the public concerning the nature of mental and emotional disorders, it seems reasonable to anticipate that such injuries that result in death or disability to workmen will be given greater consideration by the courts. The subject case is evidence of a step in that direction.

Earl R. Cruthirds

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[8]See notes 2 & 7, *supra*; Pittston Stevedoring Corporation v. Willard, 190 F.2d 267 (N.Y. 1951); State Department of Revenue v. Snelling, 65 S.E.2d 822 (Ga. 1951); Bituminous Casualty Co. v. Powell, 65 S.E.2d 825 (Ga. 1951); Massachusetts Bonding and Insurance Co. v. Turk, 66 S.E.2d 364 (Ga. 1951).

[9]See notes 6 & 7, *supra;* Roberts v. Dredge Fund, 232 P.2d 975 (Idaho 1951).

[10]Maddens Case, 222 Mass. 487, 111 N.E. 379 (1916).

BOOK REVIEWS

RECENT BOOKS

MISSISSIPPI CRIMINAL LAW AND PROCEDURE. By Earle L. Wingo. Atlanta, 1952, pp. 521, $18.00.

This work by the past president of the State Bar Association has just been released by the publishers. It presents a comprehensive compilation of both statutes and court decisions of our State and is written to aid the criminal lawyer and guarantee to those charged with a crime a fair and impartial trial. It marks a great advance forward in the practice of criminal law in Mississippi.

The volume is writen in a clear and simple style. There is a systematic and analytical digesting of this State's 485 separate criminal statutes, the 3,000 Supreme Court decisions interpreting them, the 193 statutes on criminal procedure, and the 1,500 decisions relating to them. Research is simplified by the three indexes used. There is a table of contents with the chapter titles, which are broken down into subheadings. The table of cases gives both Mississippi and Southern Reporter citations, In the back of the volume is a general index set up on a descriptive word basis.

The publishers have provided a space in the back for pocket supplements, and it is hoped that the author will keep the book up to date with annual pocket parts.

The complete coverage of the subject of criminal law is shown by the chapter headings, which include accessories, arraignments, arrests, arson, assault and battery, bail, burglary, character witnesses, confessions, constitutional law, continuances, corpus delicti, county court procedure, criminal evidence, criminal procedure, criminal statutes annotated, culpable negligence, demurrer, dying declarations, embezzlement, extradition, forgery, immunity from prosecution, indictments, insanity as defense, intoxicating liquors, larceny, limitation on jury instructions, limitations of prosecutions, manslaughter, minimum and maximum sentences, motions for a new trial, motions to quash, murder, rape, receiving stolen goods, robbery, searches and sezures, trial tactics, venue, and forms. The forms for indictments and instructions are expressly approved by the Supreme Court. The question of manslaughter resulting from the operation of a motor vehicle has long given lawyers difficulty. The chapter on culpable negligence deals with this subject, clearly enunciating the rule and the reasons therefor. The valuable chapter on trial tactics contains many of the secrets of this outstanding criminal lawyer. It is based on his experience of 29 years at the Bar, during which he has tried 185 capital cases.

This is the first book which has been written on criminal law in Mississippi, and it will bring to the author added recognition. His book will become to the criminal practice of our state what Griffith's work is to our chancery practice.

It is not represented that all of the complicated problems of criminal law will be solved by this volume, but it furnishes a practical starting point on all matters of criminal law and procedure.

*Gibson B. Witherspoon**

*Past President of Mississippi Bar
Attorney at Law, Meridian, Mississippi.

THE NATURE OF LAW. By Thomas E. Davitt, B. Herder Book Co., St. Louis, 1951. pp. 274. $4.00.

Despite its title this book does not treat generally the nature of law but rather the source of the obligation of law. Incidental to this consideration the question arises as to the possibility of a "purely penal law."

Father Davitt proceeds to explore the source of the obligation of law by recourse to a classical Scholastic distinction between intellect and will considered as distinct faculties of the rational soul. He finds that among Scholastic philosophers of the past the obligation of law has been variously attributed by the *intellectualists* to the intelligibility of the essences or natures of things and their necessary relations and by the *volitionists* to the very intrinsic capacity of the will to command unfettered by any extrinsic determination.

Among the volitionists Father Davitt singles out for analysis Henry of Ghent, John Duns Scotus, William Ockham, Gabriel Biel, Alphonse de Castro and Francis Suarez. The first one hundred and eight pages of his book are devoted to an exposition of selected passages from their works to illustrate their treatment of the problem and to confirm their adherence to the thesis that law derives primarily from an act of will rather than from an act of intellect. Since these volitionists insisted generally upon the primacy of the will and more particularly on the will as the source and obligation of law, each of them necessarily accepted either implicitly or explicitly the notion of a "purely penal law," that is, one which binds "in conscience only to the payment of the penalty and not to the act on account of which the penalty is imposed."

With striking symmetry Father Davitt then devotes the next one hundred and eight pages to the thought of six intellectualists as applied to the same problem. As proponents of the notion that the intellect is the source of law and the basis of its binding forces Father Davitt has resorted to Albert the Great, Thomas Aquinas, Thomas de Vio, Dominic Soto, Bartholomew Medina and Robert Bellarmine. These were the philosophers who held that law, an act of the intellect, "obliged because what is commanded was a means objectively necessary for the common good." For them the notion of a purely penal law which obliged in conscience only to the payment of the penalty was inadmissible.

Thus is presented divergent testimony evoked over the long span of some four hundred odd years in the trial of the issue which seemingly split the ranks of the Scholastic philosophers right down the middle. This protracted struggle over a highly conceptualized problem would seem to bear out Father Davitt's view that it is of sufficient importance to have a book written about it.

Perhaps the legal practitioner might agree that the dispute reaches well into the realities of the everyday life of the law. The irate client booked for exceeding the fifteen mile per hour speed limit in a school zone at three o'clock in the morning when all good little school children were home in bed is not readily placated by an explanation that he must pay the fine because the city council has said so. He seems to sense an injustice in the enforcement of a law in accordance with the expressed will of the lawgiver rather than in accordance with the lawgiver's readily discernible reasoned intention.

Indeed, the successful ordering of much of our complex contemporary society depends on what might be called purely penal laws. The order ordained by them is not necessary in the sense that there are usually other alternatives, and also in the sense that their penalties are generally arbitrary, determined to the extent required to obtain compliance and without regard for basic notions of equality or justice. But merely

because these laws are arbitrarily selected expedients for the assertion of the will of the legislator does not mean necessarily that their obligation is derived solely from the fact that they are so willed.

Undoubtedly the legal practitioner habitually considers that laws proceed not from a will or an intellect but from a human person possessed of both these faculties. He is aware that law either describes a necessary relation or ordains a conventional one. In the former instance it is his knowledge of the essence or nature of things which leads him to discover the necessary relations which must exist among them and, where necessary, to formulate a law to preserve them. Thus this kind of law has an intrinsic authority and power to bind by virtue of its intelligibility, that is, its possibility of being known as *necessary* by rational beings. When law ordains a conventional relation, however, the lawgiver has placed a human act involving a choice of means to some end. To the degree that the means so ordained are proportioned to the end, and the end is necessary and sufficient to the lawgiver's society, then even the conventional law has an extrinsic authority and power to bind to action. This view is usually expressed by saying that although conventional law is not necessitated by its immediate object, it is, nonetheless, required by its relation to the common good of society. The lawyer, then, as distinguished from the professional philosopher, might well conclude that a purely penal law is unthinkable since neither necessary nor conventional relations established by law depend for their obligation upon the subjective will of the lawgiver or upon the penalties decreed for their violation.

What has been said above serves to illustrate two salient points which must be made about Father Davitt's book. In the first place, bifurcation of the rational soul into intellect and will, however much it may aid general speculation, seems only to create an artificial and unreal problem when applied to the source and obligation of law. To the lawyer it hardly seems necessary to dwell upon distinctions between the faculties of intellect and will. Nor does it seem necessary that man be "interpreted" as free *or* knowing. The lawyer knows that interpretation is resorted to for the clarification of ambiguities. Clearly on the face of it man is in some way and unambiguously both free *and* knowing. Furthermore, must he worry about whether one of the faculties of the rational soul is superior to the other? Perhaps he would merely say that his experience confirms the opinion of those philosophers who make no issue of the primacy of intellect or will but merely consider the intellect first in the order of specification serving as the window of an otherwise blind will and the will first in the order of intention acting as the motivation of an otherwise immobile intellect. By making such an affirmation of the radical interdependence of the faculties he would restore that unity of the human person which so much of modern speculation, both scientific and philosophical, tends to destroy.

The second point revolves about Father Davitt's bifurcation of his own problem into a clear-cut Scholastic dialectic of will versus intellect. This way of stating the problem somewhat arbitrarily excludes the intermediate opinion that the act of the intellect and that of the will are both necessary for law. In fact as noted above, this unity would seem to be the position deserving the most extended critique because it seems to conform most to everyday experience.

The treatment of legal topics with the tools of scholastic discipline does not lead to the creation of lively or popular prose. The accent here is upon accurate translation and exposition of the historical development of two diametrically opposed sides of a very narrow issue framed necessarily in the technical language of an exacting philosophy. Within the limitations which naturally flow from this kind of work Father Davitt has written effectively and with admirable scholarship.

*Francis X. Bradley, Jr.**

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CONSERVATION OF OIL AND GAS: A LEGAL HISTORY. By Blakely M. Murphy. Published under the sponsorship of the Section of Mineral Law, American Bar Association, 1949, pp. 754.

This history of the conservation of oil and gas begins with the editor's short, concise treatise on the nature of petroleum reservoirs, the fluids, the energies and the behavior of oil and gas deposits as they are related to conservation. Of more vital interest to a practicing lawyer, there is then presented a section containing monographs on the legislative, administrative and judicial concepts of oil and gas conservation in thirty-five states of the United States. The article for each state has been prepared by eminent lawyers and officials who are in close daily contact with the operations of the conservation laws of their respective states, so the articles have an authenticity that could be gained in no other manner. The comments cover conservation statutes ranging, alphabetically, from Alabama to Wyoming and, chronologically, in point of sizeable discovery, from Pennsylvania to Florida.

Each of the monographs makes it obvious that the modern concepts of oil conservation rest on geological and engineering knowledge accumulated in the years since the discovery of Drake's Well in Pennsylvania. Just as obvious is the fact that the legislative and judicial principles which are now generally accepted in this field have been brought about by the necessity of protecting both private property rights and the public interest in these vital resources. In the states which produced oil at an early date we find much opposition to the imposition of drastic and detailed regulation and control of private property and business, but such regulation was necessary to enforce conservation measures which would guarantee the most efficient production of the minerals. The Courts of Texas and Oklahoma, both State and Federal, were possibly the main arenas in which many of the conservation principles were forged. The book traces these conflicts in each state and outlines the steps which led to limitation and control of production to the end that waste should be prevented, whether waste be defined by geological considerations, reasonable market demand, or economic conditions. Some of the most bitter dissension occurred when the various states set up drilling units, enacted laws allowing or requiring pooling, and provided for secondary recovery methods. All concerned were probably slow in realizing that secondary recovery methods, as exemplified at an early date by the East Texas Salt Water Disposal Company, are vital to the efficient production of the maximum amount of oil and gas. However, the fierce opposition to many of the conservation statutes has proved beneficial and the exemplary result is evidenced by conservation measures adopted in states such as Mississippi, which became producing areas subsequent to public acceptance of many of the basic principles of conservation. The authors have explained the measures adopted in the various states, have pointed out legal interpretations of the provisions of the laws, have included information as to the administration of the different statutes, and have, in many cases, given full information as to the qualifications, methods, procedures, and powers of the boards administering the laws. Due, at least partially, to the fact that the various conservation statutes have been administered by administrative agencies, many of the states have kept their conservation practices up to date by incorporating the most progressive geological and scientific principles in their statutes and in their administration of those statutes.

Of timely interest, especially to Southerners, is the editor's discussion of the origin of the Interstate Compact to Conserve Oil and Gas. This compact is a Congressionally-approved agreement among the producing states whereby such states, without Federal intervention, work together to conserve these vital natural resources of the United States. The individual producing states are thus harmoniously accomplishing the objectives of the compact, which are, in general, to bring about the

most efficient conservation of oil and gas. The compact created as an administrative agency—the Interstate Oil Compact Commission—with a representative from each member state. The commission achieves its objectives through a hard core of several working committees set up to study, report to, and recommend action of the Commission on such phases of conservaiton as legal problems, engineering questions, regulatory practices, economics, research and co-ordination, and problems as to public lands, interstate relations and secondary recovery.

The final section of the History is devoted to the several different roles which the Federal Government has played in the conservation of oil and gas. First, the Federal Government as a land owner has aided conservation. Secondly, the power of the central government over interstate and foreign commerce has been brought to bear to aid conservation. The war powers granted to the Federal Government have also been used widely in efforts to conserve these natural resources. Further, other Federal powers have been used to supplement the powers of the various states; for example, the Federal Oil Conservation Board has benefited conservation, as does the "hot oil" legislation. Finally, the Federal Judiciary was active in interpreting the early state laws pertaining to conservation, and has supported Federal legislative efforts relating to the public domain.

As a reference work to supply quick, comprehensive data concerning conservation statutes, methods, administrative powers and procedures, and State Court interpretations of these statutes, this legal history is a well written and skillfully edited volume which will benefit lawyers and others interested in conserving oil and gas.

*Roland D. Marble**

*Associate of the firm of Wells, Thomas, Wells & Smith, Jackson, Mississippi.

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